RECEIVED
JAN 31 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 82 6106

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

MACK ARTHUR KING,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSISSIPPI

JAMES E. ROCAP, III
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400

Attorney of Record and
Attorney for Petitioner

Date: January 31, 1983

QUESTIONS PRESENTED

1. Whether, in reviewing the jury instructions on sentencing and in affirming the Petitioner's death sentence, the Supreme Court of Mississippi utilized such a broad and vague construction of Mississippi Code Annotated Section 99-19-101(5)(h) (specifying an "especially heinous, atrocious or cruel" murder as an aggravating circumstance) as to violate the Eighth and Fourteenth Amendments to the United States Constitution.

2. Whether the Petitioner was sentenced to death in violation of the Eighth and Fourteenth Amendments to the United States Constitution, when the sentencing jury was not instructed that, regardless of the relative weight of the aggravating circumstances and the mitigating circumstances, if the jurors wish to sentence the defendant to life imprisonment they have the right to do so.

3. Whether the Petitioner was sentenced to death in violation of the Eighth and Fourteenth Amendments to the United States Constitution, when the trial court refused to instruct the sentencing jury that if the jurors were unable to unanimously agree on whether mitigating circumstances outweigh aggravating circumstances or vice versa, then their verdict should be that they are unable to unanimously agree upon the punishment to be inflicted.

TABLE OF CONTENTS

No. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

MACK ARTHUR KING,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSISSIPPI

Petitioner MACK ARTHUR KING, through his undersigned counsel, respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of Mississippi in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Mississippi is not yet reported. It is attached hereto as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Mississippi was entered on October 27, 1982. A timely petition for rehearing was denied on December 1, 1982. Appendix B. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth Amendment to the United States Constitution, which provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted

and the Fourteenth Amendment to the United States Constitution, which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. This case also involves Section 99-19-101 and Section 99-19-105 of the Code of Mississippi. Because of their length, these Sections are set out in full at Appendix D.

STATEMENT OF THE CASE

Petitioner MACK ARTHUR KING was convicted and sentenced to death by a jury in Lowndes County, Mississippi on December 5, 1980, for the murder of Lela Patterson.

Mrs. Patterson was found dead in her home on August 3, 1980. Petitioner subsequently admitted in a written statement that he had entered Mrs. Patterson's house on the preceding night, August 2, and burglarized the house. He denied harming or killing Mrs. Patterson, however, and stated that Mrs. Patterson

was alive when he left, and that his uncle, who had been standing watch outside, had entered the Patterson house after he departed (R. 178-182).

Mrs. Patterson's body was found, clothed, in a bathtub in her house. There was no water in the bathtub at the time her body was discovered. The State introduced evidence, through the pathologist who had performed the autopsy, that Mrs. Patterson had received a "significant blow" to the back of the head (R. 269) that by itself could have caused death (R. 271). The pathologist also testified that he found evidence of manual strangulation that also could have caused death (id.). Finally, the pathologist inferred from the consistency and weight of the tissue in the lungs that Mrs. Patterson "most probably" had aspirated some water into her lungs (id.) after she suffered the blow to the head and manual strangulation although, as noted above, no water was found in the bathtub at the time the body was discovered.

The pathologist was unable to state whether the blow to the head preceded the strangulation, or vice versa. He further testified that "it would be speculation" to suggest that Mrs. Patterson had been conscious or regained consciousness after the onset of her ordeal. If the trauma to the back of her head took place first, he testified, then possibly she never did regain consciousness (R. 276).

At trial on the issue of guilt, the Petitioner relied upon cross-examination of the government's witnesses. The jury returned a verdict finding Petitioner guilty of capital murder. Immediately thereafter, the trial court held a separate sentencing proceeding as required by Mississippi Code Section 99-19-101. The State presented five witnesses, all relatives of the deceased. Two witnesses testified that, in their opinion, Mrs.

Patterson's death was "especially cruel" but did not state the reasons for their opinion (R. 349, 350). Two other witnesses testified that, based on Mrs. Patterson's age (eighty-four), her death was "an especially heinous, atrocious or cruel killing" (Appendix E, R. 352, 354). The prosecutor asked all five witnesses whether it was necessary to kill Mrs. Patterson in order to obtain something from her, and all five witnesses responded in the negative (Appendix E, R. 349, 350, 351, 352, 354). Petitioner did not present any evidence in mitigation. The court reporter failed to transcribe the sentencing arguments of the prosecutor or defense counsel, so it is impossible to know with any precision what was stated to the sentencing jury (R. 355-56).

The State and the Petitioner's trial counsel proffered substantially similar sentencing instructions, both following a model sentencing instruction previously approved by the Mississippi Supreme Court for death penalty cases. See Appendix A, Hawkins, J., dissenting, at 1. The trial court gave the Petitioner's version, and instructed the sentencing jury as follows (R. 375-77):

> You have found the Defendant guilty of the crime of Capital Murder. You must now decide whether the Defendant will be sentenced to death or to life imprisonment. In reaching your decision, you must objectively consider the detailed circumstances of the offense for which the Defendant was convicted, and the character and record of the Defendant himself.
>
> To return the death penalty you must find that any aggravating circumstances -- those which tend to warrant the death penalty -- out weigh [sic] the mitigating circumstances -- those which tend to warrant the less severe penalty.
>
> Consider only the following elements of aggravation in determining whether the death penalty should be imposed:
>
> 1) The Capital Murder was committed while the Defendant was engaged in the commission of the crime of burglary or in an attempt to commit a burglary.

2) The Defendant committed the Capital Murder in an especially heinous, atrocious, and cruel manner.

You must unanamously [sic] find, beyond a reasonable doubt, that one or more of the above aggravating circumstance(s) exist in this case to return the death penalty. If none of the elements are found to exist, the death penalty may not be imposed, and you shall write the following verdict on a sheet of paper:

"We, the jury, find that the Defendant shall be sentenced to life imprisonment."

If one or more of these elements of aggravation listed above is found to exist, then you must consider whether there are mitigating circumstances which out weigh [sic] the aggravating circumstance(s). Consider the following elements of mitigation in determining whether the death penalty should not be imposed:

1) All factors and circumstances surrounding the alleged crime,

or

2) The age of the Defendant,

or

3) The background of the Defendant,

or

4) Any other facts or circumstances that you consider relative or probative or act in mitigation.

Any other matter, and any other aspect of the Defendant's character and record, and any other circumstance of the offense brought before you during the trial of this case which you, the jury, determine to be mitigating on the behalf of the Defendant.

If you find from the evidence that one or more of the preceding elements of mitigation exist, then you must consider whether it or they out weighs [sic] or overcomes the aggravating circumstance(s) you previously found, and you must return one of the following verdicts:

1) "We, the jury, unanimously find that the aggravating circumstance(s) or: (itemize and write out all of the aggravating circumstance(s) presented in this instruction which you unanimously agree exist in this case, beyond a reasonable doubt).

_____

_____

_____

_____

are sufficient to impose the death penalty and there are insufficient mitigating circumstance(s) to outweigh the aggravating circumstance(s).

_____
FOREMAN OF THE JURY"

If you find that mitigating circumstance(s) outweigh the aggravating circumstance(s) and agree to the sentence of life imprisonment, the form of your verdict should be as follows:

2) "We, the jury, find that the Defendant should be sentences [sic] to life imprisonment."

If you find that the mitigating circumstance(s) outweigh the aggravating circumstance(s) and are unable to agree to the sentence of life imprisonment, the form of your verdict should be as follows:

3) "We, the jury, have been unable to unanimously agree on punishment."

Prior to the closing arguments on sentencing, Petitioner's trial counsel moved to amend the sentencing instruction quoted above to include the following at the end of the instruction (R. 346):

> If you are unable to unanimously agree on which circumstances outweigh the other, and arrive at a verdict fixing the punishment, then the form of your verdict should be as follows:
>
> "We, the jury are unable to unanimously agree upon the punishment to be inflicted."

The trial court refused the amendment (R. 346).

The sentencing jury returned a verdict of death, as follows (R. 388):

> We, the jury, unanimously find the aggravating circumstances
>
> 1.) The Capital Murder was committed while the Defendant was engaged in the commission of the crime of burglary or in an attempt to commit a burglary.
>
> 2.) The Defendant committed the capital murder in an especially heinous, atrocious and cruel manner.
>
> are sufficient to impose the death penalty and there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

On appeal, the Supreme Court of Mississippi unanimously affirmed the jury's verdict of guilty. Appendix A at 18. With respect to the sentence of death, however, the eight participating Justices could not agree. Five Justices voted to uphold the sentence of death. Three Justices voted to reverse and remand the case for resentencing before another jury.

The issue that the majority focused on at greatest length was the trial court's refusal to accept the Petitioner's amendment to the sentencing instruction, set out at p. 6, supra. The majority concluded the refusal was not error, reasoning that the jurors were instructed that their verdict had to be unanimous, that there was no indication they had difficulty in reaching agreement, and that the trial court had a statutorily-imposed duty to dismiss the jury and impose a life sentence if the jurors could not reach agreement after a reasonable period of time. Appendix A at 15-16. Three Justices disagreed. Writing for the dissenters, Justice Sugg reasoned that the jury "was not instructed as to the verdict it could return if unable to unanimously agree on which circumstances outweighed the other." Appendix A, Sugg, J., dissenting, at 2. This failure, he concluded, violated the rule of Godfrey v. Georgia, 446 U.S. 420

(1980), that "a State must channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance." Id.

Justices Hawkins and Patterson dissented on a second, additional ground that had been raised sua sponte by the court on appeal. Appendix C. The sentencing jury, they explained, was not instructed "that after considering the aggravating and mitigating circumstances, if they wish to sentence the defendant to life imprisonment, they have the right to do so." Appendix A, Hawkins, J., dissenting, at 1. This option, they stated, must be "clearly and affirmatively" set out in the sentencing instruction. Id. at 3. Since it was not clearly and affirmatively set out, they would have remanded the case for resentencing. Id. The majority did not discuss this issue in detail, holding generally that the sentencing instructions "fully instructed the jury on the applicable law." Appendix A at 17.

At the end of its opinion, the majority undertook a broad review of the sentencing instructions, the facts, and the death sentence. With respect to the sentencing instructions, the majority cited the decision of the United States Court of Appeals for the Fifth Circuit in Jordan v. Watkins, 681 F.2d 1067, on rehearing, 688 F.2d 395 (5th Cir. 1982), and this Court's decision in Godfrey v. Georgia, 446 U.S. 420 (1980), and held that (Appendix A at 17):

> the sentencing phase instructions were so worded that the jury's discretion was suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action and channeled the jury's discretion by clear and objective standards providing specific and detailed guidance which make rationally reviewable the process for imposing a sentence of death.

With respect to its own independent review of the death penalty verdict, as mandated by Mississippi Code Section 99-19-105, the majority held (Appendix A at 17-18):

> That the evidence overwhelmingly supports the jury's findings of statutory circumstances in that the capital murder was committed while the defendant was engaged in the commission of the crime of burglary or in an attempt to commit burglary, and that the defendant committed the capital murder in an especially heinous, atrocious and cruel manner.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. The Supreme Court of Mississippi expressly cited the decisions in Godfrey v. Georgia and Jordan v. Watkins, and held that the sentencing instructions comported with the rationale of those cases. Godfrey held that the application of an aggravating circumstance similar to Mississippi's "especially heinous, atrocious or cruel" circumstance was constitutionally erroneous because it failed to channel adequately the jury's decisionmaking. Thus, while Petitioner did not raise this issue expressly in the Mississippi Supreme Court, that court understood that the constitutionality of the "especially heinous, atrocious or cruel" aggravating circumstance was an issue to be reviewed, and decided the issue in its review. This Court has jurisdiction to review it here. See Eddings v. Oklahoma, 455 U.S. 104, 113 n.9 (majority opinion) and 117 n. * (O'Connor, J., concurring); Raley v. Ohio, 360 U.S. 423, 436-37 (1959); Irvin v. Dowd, 359 U.S. 394, 403-04 (1959).

2. After the initial round of briefs were filed in the Mississippi Supreme Court, that court sua sponte directed the parties to file briefs on the issue whether the sentencing instruction should have included "directions to the jury that if it found the aggravating circumstances outweighed the mitigating circumstances the jury might impose the death sentence, but if

the jury finds that the mitigating circumstances outweighed the aggravating circumstances, it should not impose the death sentence." Appendix C. After briefing, the Mississippi Supreme Court majority (6-2), ruled that the instructions were proper. Two Justices would have ordered a resentencing for failure to include an instruction to that effect.

3. The Petitioner moved the trial court to amend its sentencing instruction to include the language quoted at p. 6, supra. The trial court refused the instruction and the Petitioner argued that the refusal was error in Proposition 3 to the Mississippi Supreme Court. That court, by a 5-3 majority, affirmed the trial court's ruling.

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE FAILURE OF THE SENTENCING COURT AND THE MISSISSIPPI SUPREME COURT TO LIMIT THE BREADTH OF THE "ESPECIALLY HEINOUS, ATROCIOUS OF CRUEL" AGGRAVATING CIRCUMSTANCE IN THIS CASE VIOLATED PETITIONER'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

This Court has not ruled on the constitutionality of Section 99-19-101(5)(h) of the Mississippi Code. That section provides, as one of the "aggravating circumstances" permitting imposition of a death sentence, that:

> The capital offense was especially heinous, atrocious or cruel.

On two previous occasions, however, this Court has considered a similar provision in the Georgia capital punishment statute that provides, as an aggravating circumstance (Ga. Code § 27-2534.1(b)(7) (1978)):

> The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

In Gregg v. Georgia, 428 U.S. 153 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) the plurality held that this aggravating circumstance was not unconstitutionally broad on its face. Although the plurality expressed concern that the language of the aggravating circumstance arguably might include any murder, it left the task of narrowing the breadth of the aggravating circumstance to the Georgia Supreme Court in the first instance. The plurality stated that "there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction" as to make the circumstance applicable to virtually any murder. 428 U.S. at 201.

Four years later in Godfrey v. Georgia, 446 U.S. 420 (1980), this Court held that Georgia's "outrageously or wantonly vile, horrible or inhuman" aggravating circumstance had been applied in a manner that was unconstitutionally vague. See 446 U.S. at 432-33 (opinion of Stewart, Blackmun, Powell and Stevens, JJ.); 446 U.S. at 434-35 (opinion of Marshall and Brennan, JJ., concurring). In Godfrey, the defendant had killed his wife and mother-in-law with two shotgun blasts following a domestic dispute. 446 U.S. at 432-33. The plurality noted that the Georgia Supreme Court in prior cases had identified three criteria that limited the application of the otherwise troublesome aggravating circumstance. 446 U.S. at 431-32. But those criteria had not been used by the Georgia Supreme Court in Godfrey to properly limit the application of the "outrageously or wantonly vile, horrible or inhuman" aggravating circumstance. Thus, "there [was] no principled way to distinguish [Godfrey's] case, in which the death penalty was imposed, from the many cases in which it was not." 446 U.S. at 433.

Although we are not here challenging Section 101(5)(h) as unconstitutional on its face, Mississippi's version of the aggravating circumstance found wanting in Godfrey is in fact even

broader and more vague. Whereas in Georgia the jury by statute must find that the murder involved "torture, depravity of the mind or an aggravated battery to the victim," there is no similar statutory requirement in Mississippi. The jury need only find that the capital offense was "especially heinous, atrocious or cruel." [1] The challenge here, however, is to the application of Section 101(5)(h) in this case. In that regard, it is notable that, unlike the Georgia Supreme Court, the Mississippi Supreme Court has never undertaken to provide any standards that might limit the application of the "especially heinous, atrocious or cruel" aggravating circumstance. It has never indicated any concern that this aggravating circumstance might be abused, nor has it attempted to insure that the aggravating circumstance does not become a "catch-all" provision. Compare Godfrey v. Georgia, 446 U.S. at 429 (citing Harris v. State, 237 Ga. 718, 732, 230 S.E.2d 1, 10 (1976)); see Gregg v. Georgia, 428 U.S. at 201 (opinion of Stewart, Powell and Stevens, JJ.).

The Mississippi Supreme Court has reviewed five death sentences prior to this case, and one case after it, in which the "especially heinous, atrocious or cruel" aggravating circumstance was found. The court's analysis of the aggravating circumstance in these cases provides no meaningful guidance for juries, for trial judges, or for itself, to insure that the circumstance is not unconstitutionally applied. In Washington v. State, 361 So.2d 61 (Miss. 1978), the court rebuffed a challenge to Section 101(5)(h) on its face, reasoning only that the average citizen knows what the words of the Section mean (361 So.2d at 65-66):

---

[1] The statutory language is in the disjunctive. Thus, the sentencing jury by statute is permitted to choose any one of the three descriptive words: "heinous" or "atrocious" or "cruel." In this case, however, the jury was charged in the conjunctive, i.e., that it must find that the capital offense was "especially heinous, atrocious and cruel." See p. 4, supra (emphasis added).

> We must remember that the twelve members of the trial jury were a jury of the defendant's peers, and came from the county of the defendant's residence. The jury was composed of average citizens possessing average intelligence, a cross-section, if you please, of the citizenry of the community. In our opinion the words "especially heinous, atrocious or cruel" are not confusing nor likely to be misunderstood by the average citizen. The average citizen has a reasonable knowledge of the generally accepted meaning of these words. He comes in contact with these words frequently, if not in personal conversation at least through the news media of television, radio or the press.
>
> . . . .
>
> It is our considered opinion that the average jury in its sound discretion and judgment understands the generally accepted meaning of the words "especially heinous, atrocious or cruel" and is able to apply these words in different factual situations without further definition of these words.

In Voyles v. State, 362 So.2d 1236, 1245 (Miss. 1979), the Court agreed with the jury's finding that the murder was "especially heinous, atrocious or cruel", but offered no explanation or principled basis for its conclusion other than "the facts and circumstances of this case." In Gray v. State, 375 So.2d 994, 1005 (Miss. 1979), the court affirmed the jury's Section 101(5)(h) finding, offering only that "[i]t was a brutal killing for a sordid purpose of a helpless child." In Coleman v. State, 378 So.2d 640, 648 (Miss. 1979), in response to another argument that Section 101(5)(h) is unconstitutionally vague and overbroad, the court merely repeated its statement in Washington v. State, supra. In Jones v. State, 381 So.2d 983, 995 (Miss. 1980), the court stated only that the jury's Section 101(5)(h) finding:

> was proved by pictures illustrating the atrociousness of the killing, together with testimony showing the victim to have been old and weak in comparison with appellant.

Finally, in Evans v. State, ___ So.2d ___ (No. 53,754, Miss. Nov. 3, 1982) (Appendix F hereto), decided one week after this case, the court noted the possibility "that the facts of the homicide

do not pass constitutional muster on the aggravating circumstance of being especially heinous, atrocious or cruel", but nevertheless held that "the jury could consider mental torture and aggravation which the victim probably underwent, and to determine whether or not the murder under all the facts and circumstances was especially heinous, atrocious or cruel." _____ So.2d at ____ (Slip Op. at 9). Indeed, in Evans the court upheld the refusal of an instruction that would have attempted to narrow the permissible application of Section 101(5)(h) in accord with the Fifth Circuit's opinion in Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978) (construing a similar provision in the Florida statute). The appellant in Evans asked that the trial court approve the following instruction (___ So.2d at ___, Slip Op. at 14):

> The Court instructs the Jury that the terms heinous, atrocious, and cruel are deemed to include those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies in that it involved the conscienceless or pitiless crime which is unnecessarily torturous to the victim. If you find from the evidence that the victim died a quick death without unnecessary pain and torture, then, though the crime is murder, it is not to be considered as especially heinous, atrocious or cruel.

Compare Spinkellink v. Wainwright, 578 F.2d at 611. The Mississippi Supreme Court, without further reasoning, held flatly that the proffered instruction "was too restrictive and its refusal does not constitute reversible error notwithstanding Godfrey v. Georgia." ___ So.2d at ___ (Slip Op. at 14).

As is readily evident from the above review, the Mississippi Supreme Court has made no effort to provide principled standards for the application of Section 101(5)(h) in capital murder cases. In only two cases preceding this one did it expressly focus on a particular fact that might provide a clue

as to the application of the Section. See Gray v. State, supra (focusing upon the young age of the victim and the purpose of the killing); Jones v. State, supra (focusing upon the old age and weakness of the victim). And it has rebuffed any attempt to provide the Section with some meaningful standard or guide for its application in a particular case. See Evans v. State, supra (decided after this case). Thus, in Mississippi "there is no principled way to distinguish" one case where the death penalty was imposed "from the many cases in which it was not." Godfrey v. Georgia, 446 U.S. at 443.

The effect of the Mississippi Supreme Court's willingness to permit sentencing juries in Mississippi to exercise unbridled and standardless discretion in applying Section 101(5)(h) is well illustrated by this case, in which a serious factual issue was presented, i.e., whether the victim underwent any mental or physical torture prior to death that might serve to distinguish this case from others where the death penalty was not imposed. Compare, Godfrey v. Georgia, supra (shotgun murder, without evidence of torture or aggravated harm, not distinguishable from other murders where death penalty not imposed); Evans v. State, supra (decided after this case; "jury could consider mental aggravation and torture"). The pathologist who examined Lela Patterson's body two days after the killing testified that it is possible the victim received an initial severe blow to the back of the head and never regained consciousness. To be sure, the State attempted to show that Mrs. Patterson's death was not instantaneous, and that she could have regained consciousness. The pathologist, however, freely admitted that the State's apparent theory was pure "speculation" (R. 276).

The point, of course, is not that the Mississippi Supreme Court should have resolved the factual issue whether Mrs.

Patterson suffered mentally or physically any more than if she had been killed instantaneously (as was the situation in Godfrey). The constitutional flaw was in the trial court's and the Mississippi Supreme Court's total failure to articulate meaningful, constitutionally acceptable standards for the sentencing jury by which the murder in this case could be distinguished from the many others that do not result in a death sentence. For example, the jury was permitted to determine whether the murder was "especially heinous, atrocious and cruel", without ever being instructed on the importance of the resolution of the factual issue of mental or physical torture prior to death, or on the fact that not all murders constitutionally can be deemed to be "especially heinous, atrocious or cruel". 2/ Similarly, the Mississippi Court made its own determination that the aggravating circumstances existed, without any standard more specific than something akin to "we know it when we see it". See Appendix at 17-18.

The history of the Mississippi Supreme Court's treatment of Section 101(5)(h), and its application in this case, demonstrates convincingly that there are no standards by which a Mississippi jury's initial sentencing determination on Section 101(5)(h) has been channelled. Further, it demonstrates that there are no standards by which the Mississippi Supreme Court itself reviews a sentencing jury's determination on Section

---

2/ Without any standards to guide their discretion, the jurors easily could have been misled by the State's presentation of evidence at the sentencing hearing. See Appendix E. Thus, while four of the five witnesses expressed their opinion, in differing versions, that the killing was heinous, atrocious and cruel, the sole reason given for that opinion was that Mrs. Patterson's death was unnecessary because she would have given the killer whatever he wanted. But that fact -- upon which the jury would focus principally because it was the only evidence presented at the stage where they were expressly asked to consider the sentence -- is true of almost any killing where the killer's purpose is to steal. It could not justifiably distinguish this killing from others where the death sentence was not imposed.

101(5)(h). The Mississippi Supreme Court, of course, should in the first instance articulate acceptable standards, subject to this Court's review. But where a state supreme court has failed to engage in the development of constitutionally acceptable limitations on the breadth and meaning of the "especially heinous, atrocious or cruel" aggravating circumstance, this Court must act. Moreover, it is not enough merely to remand to the state supreme Court for its own substantive review of the death sentence. A death sentence cannot be affirmed on the basis of a statutory aggravating circumstance that was improperly found by the sentencing jury, and the state supreme court cannot post facto substitute its own judgment as to what the sentencing jury might have found if properly instructed. See Presnell v. Georgia, 439 U.S. 14 (1978).

Accordingly, this Court should grant the petition for certiorari as to the first question presented, reverse the judgment as to the death penalty, and remand the case for resentencing pursuant to constitutionally acceptable instructions to the sentencing jury on Section (5)(h). 3/

3/ In light of the jury's finding that a second aggravating circumstance existed -- that the crime was committed in the course of a burglary -- the question is presented whether the unconstitutionality of Section (5)(h) as applied presents cause for reversal and remand. We believe that it clearly does, for the reasons stated by the Fifth Circuit in Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), cert. granted, 454 U.S. 815 (1981), question certified to Supreme Court of Georgia, ___ U.S. ___, 102 S.Ct. 1855 (1982). This Court has reversed and remanded several cases, where more than one aggravating circumstance existed, in light of Godfrey v. Georgia. See Davis v. Georgia, 446 U.S. 961 (1980); Collins v. Georgia, 446 U.S. 961 (1980); Baker v. Georgia, 446 U.S. 961 (1980); Hamilton v. Georgia, 446 U.S. 961 (1980). But see Martin v. Louisiana, 449 U.S. 998 (1980); Drake v. Zant, 449 U.S. 999 (1980).

At the very least, we submit this Court should defer its decision in this case pending determination of Zant v. Stephens, supra, which may dispose of the issue presented by the jury's finding of two aggravating circumstances, at least one of which clearly was constitutionally flawed.

II.

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER A SENTENCING JURY IN MISSISSIPPI MUST BE INSTRUCTED THAT, REGARDLESS OF THE BALANCING OF THE MITIGATING AND AGGRAVATING CIRCUMSTANCES, IT MAY SENTENCE THE DEFENDANT TO LIFE IMPRISONMENT

The second question presents a direct conflict between the Mississippi Supreme Court and the United States Courts of Appeals for the Fifth and Eleventh Circuits, and further presents a conflict between the Mississippi Supreme Court and the principles articulated by this Court relevant to imposition of the death sentence.

In this case, the trial court did not instruct the sentencing jury that, even if it found the existence of aggravating circumstances, or even if it found that the aggravating circumstances outweighed the mitigating circumstances, it still had the option of recommending mercy and sentencing the defendant to life imprisonment. Indeed, the trial court not only failed to provide this option to the sentencing jury, it expressly restricted the jury as to (a) the verdicts it could return and (b) the reasons why it could return a particular verdict. Thus, the trial court instructed the jury that if they found any element of mitigation 4/, they "must return one of the following verdicts":

> (1) A sentence of death, if they unanimously agreed that the aggravating circumstances outweighed the mitigating circumstances and the aggravating circumstances considered alone were sufficient to warrant the death penalty;
>
> (2) A sentence of life imprisonment, if they found that the mitigating circumstances outweighed the aggravating circumstances; or

---

4/ At least two mitigating circumstances clearly existed: the youth of the defendant (21 years) and the absence of any evidence of a prior conviction of a violent offense.

(3) No sentence, if, although they found that the mitigating circumstances outweighed the aggravating circumstances, they could not agree to impose a sentence of life imprisonment. (In such a case, the trial court would then impose a life sentence.)

Under these instructions, the jurors were not even permitted, much less informed that they had the option, to sentence the Petitioner to life imprisonment even if they found that the aggravating circumstances outweighed the mitigating circumstances. Instead, they were instructed that if they found that the aggravating circumstances outweighed the mitigating circumstances, they "must" return a verdict imposing the death sentence.

The Mississippi Supreme Court realized that the trial court's instruction raised the issue whether the jury was instructed, or should have been instructed, that they always had the option to sentence Petitioner to life imprisonment, and asked for supplemental briefs on the issue. Appendix C. Upon review of the arguments, the court held (6-2) that the instructions adequately set forth the applicable law. Appendix A at 17. There are three reasons why certiorari should be granted to review this decision.

First, the Mississippi Supreme Court's holding directly conflicts with the decisions of the Fifth and Eleventh Circuits on this issue. Most recently, the Eleventh Circuit Court of Appeals ordered that a death sentence be vacated because "[n]owhere does the [sentencing] charge even slightly hint about the option to impose life imprisonment even though aggravating circumstances are found." Goodwin v. Balkcom, 684 F.2d 794, 802 (11th Cir. 1982). The court relied upon two earlier decisions of the Fifth Circuit, Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981), cert. denied, ___ U.S. ___, 102 S.Ct. 3495 (1982), and Chenault

v. Stynchcombe, 581 F.2d 444 (5th Cir. 1978), both of which required that, under Lockett v. Ohio, 438 U.S. 586 (1978), and Bell v. Ohio, 438 U.S. 637 (1978), the trial judge must clearly instruct the jury, inter alia, about "the option to recommend against death." 5/ See 684 F.2d at 801; quoting 661 F.2d at 471 and 581 F.2d at 448. The court then concluded (684 F.2d at 801-02; emphasis added):

> In this circuit, then, the state of the law is well settled. Capital sentencing instructions which do not clearly guide a jury in its understanding of mitigating circumstances and their purpose, and the option to recommend a life sentence although aggravating circumstances are found, violate the eighth and fourteenth amendments.

Second, the Mississippi Supreme Court's holding is inconsistent with this Court's rulings that mandatory death sentences are unconstitutional. The instructions to the jury mandated a death sentence if the jurors found that the aggravating circumstances outweighed the mitigating circumstances. This Court consistently has held that mandatory death sentences are impermissible under the Eighth and Fourteenth Amendments. See Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976). The purpose of requiring that the sentencing jury weigh the aggravating and mitigating circumstances is to ensure that the jury's discretion is suitably channelled; it cannot be an arbitrary arithmetic exercise of adding up the factors on either side and then mandating a result depending upon which side totals

---

5/ This Court has held that "[n]othing in any of cases suggests that the decision to afford an individual defendant mercy violates the Constitution." Gregg v. Georgia, 428 U.S. at 199 (opinion of Stewart, Powell and Stevens, JJ.).

higher than the other. That is precisely what the sentencing jury was instructed to do in this case, however. 6/

Third, even if the Eighth and Fourteenth Amendments do not, as a general rule, require that the sentencing jury be informed of the option to impose life imprisonment, they so require in Mississippi. The Mississippi statute has been construed to provide that the jury "is free to find" that the existence of an aggravating circumstance, even in the absence of mitigating circumstances, is "insufficient to warrant death" and that the jury "is not required to automatically impose death." Coleman v. State, 378 So.2d 640, 646 (Miss. 1979). When the jury here was not instructed that they had the option to sentence Petitioner to life imprisonment, they were not informed of a critical option that other juries in Mississippi presumably possess. The substantial possiblity exists in Mississippi, therefore, that some juries understand they have the option, while others (including this one) do not. Such disparity is a clear violation of the Eighth and Fourteenth Amendments.

This Court should grant the writ of certiorari as to the second question, vacate the judgment as to the sentence of death, and remand for resentencing consistent with the decisions of the Fifth and Eleventh Circuits quoted above.

6/ The instructions in this case are also infected with the same ambiguity as was outlined in Mr. Justice Stevens' recent opinion respecting the denial of certiorari in Smith v. North Carolina, 51 U.S.L.W. 3418 (Nov. 30, 1982). Thus, there is a substantial danger in this case, as in Smith, that the sentencing instruction does not provide any assurance that "death is the appropriate punishment" in this case. See Lockett v. Ohio, 438 U.S. 586, 601 (1978).

III.

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER A SENTENCING JURY MUST BE INSTRUCTED THAT IF IT CANNOT UNANIMOUSLY AGREE ON WHICH CIRCUMSTANCES OUTWEIGH THE OTHER, THEN ITS VERDICT SHOULD BE THAT IT CANNOT AGREE ON THE PUNISHMENT TO BE INFLICTED

Finally, this case presents a question of first impression. At trial, the sentencing jurors were instructed that they had three possible verdicts which they could return:

(1) A sentence of death, if they unanimously agreed that the aggravating circumstances outweighed the mitigating circumstances and the aggravating circumstances considered alone were sufficient to warrant the death penalty;

(2) A sentence of life imprisonment, if they found that the mitigating circumstances outweighed the aggravating circumstances; or

(3) No sentence, if, although they found that the mitigating circumstances outweighed the aggravating circumstances, they could not agree to impose a sentence of life imprisonment. (In such a case, the trial court would then impose a life sentence.)

This instruction left no room for a fourth possibility: that the jurors simply could not agree whether the mitigating circumstances outweighed the aggravating circumstances, or vice versa. The jurors were told, in effect, that they had to resolve which circumstances outweighed the other, and that disagreement on that issue was not a possible alternative.

Since Furman v. Georgia, 408 U.S. 238 (1972), this Court repeatedly has held that the decision to impose the death penalty has "to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant." Gregg v. Georgia, supra, 428 U.S. at 199 (plurality opinion). In Lockett v. Ohio, 438 U.S. 586 (1978), this Court reversed a death sentence because the jurors were not permitted to consider all possible mitigating

circumstances in reaching their decision on death or life imprisonment. "[T]he fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Eddings v. Oklahoma, 455 U.S. 104, 112 (1982), quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976). This Court has also explained that "[s]ince the members of the jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given." Gregg v. Georgia, 428 U.S. at 192 (opinion of Stewart, Powell and Stevens, JJ.).

The sentencing instruction in this case did not inform the jurors that they had a fourth alternative verdict, which otherwise was clearly available to them. Absent that instruction, they were deprived of the discretion to conclude that they could not ascertain whether the mitigating circumstances outweighed the aggravating circumstances. This Court should grant the writ of certiorari to determine whether this omission so deprived the sentencing jury of its ability "to focus on the particularized circumstances of the crime and the defendant", Gregg v. Georgia, 428 U.S. at 199, that petitioner's death sentence was imposed in violation of his Eighth and Fourteenth Amendment rights. 7/

7/ Alternatively, the Court should defer action on this petition pending its decision in California v. Ramos, 30 Cal.3d 553, cert. granted, 51 U.S.L.W. 3253 (Oct. 5, 1983), which may articulate principles on the extent to which sentencing juries should be informed in the sentencing process.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

JAMES E. ROCAP, III
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400

Attorney of Record and
Attorney for Petitioner

Date: January 31, 1983

APPENDIX A

IN THE SUPREME COURT OF MISSISSIPPI

NO. 53,027

MACK ARTHUR KING

v.

STATE OF MISSISSIPPI

EN BANC

SUGG, PRESIDING JUSTICE, FOR THE COURT ON PARTS I AND II

WALKER, PRESIDING JUSTICE, FOR THE COURT ON PART III

About 10:30 a.m. on August 3, 1980 Mrs. Lelia Patterson was found dead in a bathtub in her home. An investigation revealed that the screen on a door had been cut, the telephone wires outside the house had been severed, articles were scattered throughout the house, and dresser drawers had been emptied on the floor. A fingerprint and palmprint were found on two file folders in a box located in the house. The prints matched known fingerprints and palmprints of appellant. Appellant's residence was searched two days later and several items which belonged to Mrs. Patterson were found. Appellant was arrested on August 6th and denied that he had been at Mrs. Patterson's house on August 3rd. The officers interviewed appellant's girlfriend, Barbara Jordan and on the basis of information received from her, appellant's residence was searched a second time and additional items from Mrs. Patterson's home were found.

Appellant was questioned after the second search and admitted that he entered the house of Mrs. Patterson on Saturday night, August 2nd, burglarized the house, saw Mrs. Patterson, but did not kill her. In his second statement he said he was accompanied by Willie Porter who remained outside

while appellant burglarized the house, that Mrs. Patterson was alive when he left the house, and that Willie Porter entered the house as he was leaving. Appellant also said he saw Willie later in the morning of August 3rd and Willie told him that he, Willie, had taken some articles from Mrs. Patterson's house.

After signing the second statement, appellant agreed to another search of his premises and told the officers where to find additional items stolen from Mrs. Patterson which were hidden near his house.

According to Barbara Jordan, appellant showed her some of the articles he had stolen but did not tell her where they came from. She testified that appellant was wearing green pants on Saturday, August 2nd and Sunday, August 3rd which were confiscated by the police. On Tuesday appellant washed the pants after refusing to let the witness wash them as was customary. Human blood was found on the pants but not in a sufficient amount to ascertain the blood type.

The pathologist who performed the autoposy on Mrs. Patterson's body testified that she had multiple bruises about her neck, face, and arms, a laceration on the back of her head, and water in her lungs. In the opinion of the pathologist Mrs. Patterson had been manually strangled, struck on the back of the head with such force that it caused edema of the brain, and had been under water while she was either conscious or unconscious. He was unable to ascertain the order in which the events occurred, but stated if the manual strangulation took place first, then the victim could have regained consciousness, but if the trauma to the skull occurred first, she possibly never regained consciousness. Mrs. Patterson's death could be attributed to either strangulation, a blow to the head, or drowning. The findings of the pathologist show conclusively that Mrs. Patterson was brutally murdered.

I.

Appellant does not question the sufficiency of the evidence in his four assigned errors. The first two assignments of error will be discussed together because the proof and argument pertaining to them are interrelated. The first two assignments of error are as follows:

> The lower court erred when the juror Mary Castlebury Holley was separated from the rest of the jury panel and subsequently allowed to return to the jury room following voir dire by both the State's attorney and the attorney for the defendant.
>
> The lower court erred in overruling the defendant's motion to excuse the juror Mary Castlebury Holley after voir dire examination revealed that she had failed to disclose certain facts to the defendant on voir dire examination. The failure of the juror to disclose this certain information and the trial court's overruling the motion to excuse the juror from the panel denied the defendant due process of law as he was not allowed to exercise his peremptory challenges by the process and manner dictated by law.

On the second day of the trial one of the court-appointed attorneys for appellant made a motion to excuse Mrs. Holley and replace her with an alternate juror because she was the former wife of Jimmy Covington, a deputy sheriff of Lowndes County and because the juror's father, Elton Castlebury, was a defendant in a lawsuit filed by G. B. Green, Sr. then pending in the Supreme Court of the State of Mississippi and that Green was represented by one of appellant's attorneys. However, a check of the docket shows that no case involving Castlebury and Green has been filed in this Court.

The State called Jimmy Covington who testified that he was the former husband of Mrs. Holley, two children were born to their marriage, and they had been divorced for five years. During his marriage to Mrs. Holley, Covington was a member of the sheriff's mounted patrol but was not a deputy sheriff.

At the time of the trial, Covington was a deputy sheriff in charge of civil process and also acted as a bailiff for the courts. Covington was one of the bailiffs who took the jury to supper the night before. On cross-examination he stated that he was not a sworn deputy while a member of the mounted patrol, but the patrol would be called out when, "someone was lost or something." He testified that he knew G. B. Green, Sr. was a neighbor of his former wife's father, Elton Castlebury, and three weeks before appellant's trial he had been told by appellant's counsel of the lawsuit between Green and Castlebury, but he thought the lawsuit had been concluded.

After both sides rested trial judge permitted defense counsel to question Mrs. Holley She first said that while she was married to Jimmy Covington he was not a member of the sheriff's mounted patrol but later admitted he may have been a member of the sheriff's posse. Additional testimony was elicited from the witness as follows:

> Do you recall the question yesterday about whether you were related by blood or marriage now or in the past to any member of law enforcement; did you understand that that could have included this particular individual?
>
> A. No, I did not.
>
> Q. You do acknowledge that you did not raise your hand at that time; you do acknowledge that you didn't raise your hand?
>
> A. I don't recall the question that --
>
> Q. You don't recall the question; All right, Mrs. Holley, who's your dad, I may have asked you?
>
> A. Elton Castlebury.
>
> Q. And, Mrs. Holley, do you know a one, G. B. Green, Sr.?
>
> A. Yes.
>
> Q. Is he a next door neighbor of your dad's?
>
> A. Yes.
>
> Q. Is there current litigation going on between them over a pond in the Supreme Court of the State of Mississippi?
>
> A. Not that I know of.

MR. SAMS:

I've got no further questions of this witness.

QUESTIONING BY MR. HOWARD:

Q. Did you know that Joe Sams, Jr., the lawyer that just questioned you, represented Mr. Green at all against your father?

A. No, I didn't.

Q. And that would have been the reason you didn't respond when Mr. Sams asked you yesterday if any -- if he represented anybody in lawsuits against you or any other members of the jury or their families?

A. Yes, sir. Can I say something?

Q. Sure.

A. I -- the -- the last that -- the last time that Mr. Green sued my father I thought it was Mr. Burgin.

Q. You didn't know anything about Joe Sams being involved, did you?

. . . .

Q. Then you don't even remember Mr. Sams even asking a question about being related to members of law enforcement, do you?

A. No.

Q. If --

A. I -- I remember him asking if you were related to someone who is in law enforcement.

Q. But you are not related to anyone that's in law enforcement, is that correct?

A. No.

Q. Even if you were would that have influenced your verdict in this case?

A. No.

Q. Would you base your verdict solely on the evidence and the testimony that you've heard in the last two days?

A. Yes, sir.

Q. Do you feel that you could be fair and impartial to the State of Mississipi and to Mack Arthur King in this case?

A. Yes, sir.

Q. And base your verdict on the evidence?

A. Yes.

MR. HOWARD:

Nothing further, Judge.

QUESTIONING BY COURT:

Q. Mrs. Holley, apparently now it's come out that Mr. Sams does represent Mr. Green against your father, would that influence you in any way in the trial of this case, if that were true?

A. No, sir.

Q. And while you were married to Mr. Covington, as far as you know he was not involved in law enforcement?

A. He may have been a member of the sheriff's posse; other than that, no.

Q. Would that -- even if he had been a member of the sheriff's posse, would that influence you in any way?

A. No, sir.

Q. Do you have any particular feelings for Mr. Covington now that would influence you in any way?

A. No, sir.

* * * *

THE COURT:

All right, you may return to the jury room.

MR. SAMS:

Your Honor, we're going to specifically at this time object to the -- the juror being allowed to return. Now, that she's been advised that I've got a lawsuit against her Dad because this is a capital murder case, and for her to return now, you know, fresh with the knowledge that I'm involved against her father I think would be extremely detrimental and harmful to the interest of the defendant.

THE COURT:

I believe she's testified under oath that this would not affect her in any manner.

MR. SAMS:

'Well, we think that -- we think that -- that though she speaks with complete candor and honesty, I'm sure, that the subconscious knowledge that I've got an ongoing litigation against her own father has got to have some effect, and this is, of course, a court appointed case, and it's a capital case, and I'm very concerned about it.

THE COURT: What does the State feel?

MR. HOWARD:

Your Honor, this juror answered the questions that she would be fair to both parties, and that's all the State ever wants is a fair juror, and she said that she would be fair, and that's what we want. I believe this lawsuit thing is in the Supreme Court; it's not a -- it's a paper lawsuit now, your Honor, and not -- not any Circuit Court litigation or any witnesses involved, your Honor.

THE COURT:

All right, the motion will be overruled. You may return to the jury room, Mrs. Holley.

(JUROR RETURNS TO JURY ROOM)

Appellant first argues that the separation of Mrs. Holley from the other jurors vitiated the verdict of the jury.

This argument is based on Woods v. State, 43 Miss. 364 (1870) in which this Court followed the common law rule that a defendant on trial in a capital case was entitled to have the jury sequestered, from oath to discharge. In Woods, the jury, after having heard part of the evidence, was permitted to disburse and go at large on motion of appellant's counsel until 10:00 o'clock the next morning. We reversed and stated:

"If the verdict be given under circumstances which might conduce to an improper influence, or the natural tendency of which might be to produce bias or corruption, it cannot then be said to be above suspicion; and if it be not, it must fall short of that perfection which the law requires, and which, under a more guarded administration, it is capable of producing. It is not necessary that an attempt should be made to bias the minds of the jurors, or that any pernicious influence should be exerted. The door to tampering is to be closed. This is the only security. For if it be left open, it may be predicted with certainty, that the evil consequences will fall somewhere." If the purity of the verdict might have been affected, it must be set aside. A verdict on which doubts might rest, cannot be good. It must command entire confidence. And this is the doctrine of the cases of the Commonwealth v. McCaul, 1 Virginia Cases, 271; and McLean v. the State, 10 Yerger, 241. In neither of these cases of Hare, McCaul, and McLean, was any such thing as tampering with the jury shown, and the courts held that to be unnecessary, and say that it is sufficient that they might have been subject to improper influences. In order to maintain the purity and integrity of this species of trial, great care and precaution on the

part of the courts should be observed to guard the jury against improper influences; and the more effectually to do this, we hold the only safe practice to be to regard the separation of the jury, even by the permission of the court, during the trial of a capital case, either with or without the consent of the prisoner, except in a case of great necessity, or the separation of any of the jurors from their fellows during the progress of the trial, without being attended by a proper sworn officer, to be conclusive evidence of such an irregularity as will vitiate the verdict and render a new trial necessary.
(43 Miss. at 370) (emphasis added.)

In Lampley v. State, 291 So.2d 707 (Miss. 1974), two jurors were inadvertently separated from the others for about fifteen or twenty minutes. We held that the separation did not vitiate the verdict of the jury. In Lampley, we stated that the strong language of Woods was and is sound law, "although the language of the opinion is inappropriate to an inadvertent separation for a brief time such as that involved in the present case." We stated further:

> In Skates v. State, 64 Miss. 644, 1 So. 843 (1887), the jurors were allowed to go to a privy while the officer in charge was some seventy-five yards away and out of sight of the jurors. There was no showing that any other persons talked to the jurors, but since the privy was a public one, other persons might have been in the privy with the jurors. In rejecting the contention that the separation of the jury vitiated the verdict, the Court in Skates said:
>
> > "There are to be found many expressions in our reported cases to the effect that where circumstances were shown which exposed the jury to the possibility of being tampered with, the verdict must be set aside unless it is affirmatively made to appear that no improper influences were brought to bear upon it. But this language must be interpreted by the circumstances of the case in which it was used. . . .
> >
> > In all these cases the verdicts were set aside, and new trials awarded. It will be noted that in all of them it was either shown that other persons had been brought in contact with the jury, or that there was a separation of the jury under such circumstances as to afford a reasonable presumption that communication was had with others; there was in each case

something more than a remote possibility that such communication was had, though in many of the cases observations are made by the court indicating that any separation of one juror from his fellows would be sufficient to annul the verdict unless it was affirmatively shown that no communication was had with others.

We find no fault with the result reached in either of the cases cited, but we do not concur in the language used in some of them from which the conclusion is sought to be drawn, and reasonably, that the mere withdrawal of a juror from the sight of his fellows and of the officer is under any and all circumstances a separation of the jury. Whether it is or is not must, as it seems to us, be dependent upon the circumstances of each particular case. Judges and jurors are but men, and we know of no reason why, in dealing with the action of jurors, any impracticable and unapproachable standard shall be adopted by courts to measure their conduct, -- a standard which, if applied to the judges of the courts, would produce frequent miscarriages of justice. If the mere possibility of unlawful communication or influence is sufficient to annul a verdict, when shall one be said to be pure and free from suspicion? All our courthouses are in public places, and the public have right of access to them. At sessions of court many persons are there congregated, either from curiosity or by reasons of business for themselves or others. Jury-rooms open into the court-rooms, frequently filled with spectators, or by windows overlook the yards. Communication by writing, by signs, and by words is always possible, but it would be destructive to the ends of justice to hold that such possibility as this of unlawful influence should avoid verdicts upon which no just suspicion rests. To this all must agree. 64 Miss. at 651, 653, 1 So. at 845, 847."

In Haley v. State, 123 Miss. 87, 85 So. 129, 10 A.L.R. 462 (1920), the separation was brought about by a juror's illness and the Court reaffirmed the language in Skates, and added that "the true test there [in Skates] indicated is whether the judicial mind would conclude that unlawful influence has been exerted." 123 Miss. at 109, 85 So. at 133, 10 A.L.R. at 469.
(291 So.2d at 709)

In this case Mrs. Holley was brought from the jury room to the courtroom for examination. The separation was necessitated by the fact that appellant's counsel desired to question the juror in an attempt to show that she should be

replaced with an alternate juror. The separation of the juror was necessary to permit the appellant to attempt to show bias or prejudice on the part of the juror without exposing the remaining jurors to the questions which might be asked. Woods does not hold that every separation of a juror would vitiate the verdict of the jury, but recognizes that if a separation is required in a case of great necessity or if the juror is attended by a properly sworn officer, the jury verdict is not vitiated by such separation. The separation of Mrs. Holley from the other jurors was not under circumstances "as to afford a reasonable presumption that communication was had with others." The trial judge did not err by permitting the juror to be separated from the other jurors to permit appellant's counsel to question her in the presence of the court.

Appellant also argues that Mrs. Holley should have been replaced with an alternate juror because she had formerly been married to a man who was now a deputy sheriff. Her ex-husband was not a deputy sheriff while they were married and his only association with the sheriff was as a member of the mounted patrol. In the words of the ex-husband the mounted patrol would only be called out when "someone was lost or something." Mrs. Holley was not disqualified because her ex-husband, following the divorce, was a deputy sheriff, and during their marriage was a member of the sheriff's mounted patrol.

Appellant also contends that Mrs. Holley should have been replaced with an alternate juror because of the litigation existing between her father and one Castlebury, who was represented by one of appellant's court-appointed attorneys. Mrs. Holley's knowledge of the litigation between her father and Castlebury was not fully developed and she testified that she thought Castlebury was represented by another attorney. The attorney represented that the case was then pending on appeal

in the Supreme Court, but this Court's records do not show that the case was then pending or is now pending.

Appellant relies on Adkinson v. State, 371 So.2d 869 (Miss. 1979); Brooks v. State, 360 So2d. 704 (Miss. 1978); Daze v. State, 356 So.2d 1179 (Miss. 1978) and Odom v. State, 355 So.2d 1381 (Miss. 1978), as authorities sustaining his argument that Mrs. Holley should have been dismissed from the jury. Appellant's reliance on these cases is misplaced because all of these cases involve the discovery, after trial, that a prospective juror failed to respond to a relevant and direct question concerning facts within the juror's knowledge which had a bearing on the juror's competence to serve. In these cases the nondisclosure by the juror of relevant information occurred after trial and there was no opportunity to question the juror during trial to determine if the juror, despite the relevant facts, would be fair and impartial.

Appellant's counsel was afforded the opportunity to examine the juror who stated unequivocally that she would base her verdict solely on the evidence that she had heard in the two days of the trial and that she could be fair and impartial to the state and to appellant.

It is familiar law that it is the duty of the court to see that a competent, fair, and impartial jury is empanelled. McCarty v. State, 26 Miss. (4 Cushm.) 299, 1 Mor. St. Cas. 705 (1853), and the question of whether a juror is fair and impartial, is a judicial question, and the judgment of the trial court will not be disturbed unless it clearly appears that it is wrong. Odom v. State, supra.

Although there is no showing in the record that the litigation between Mrs. Holley's father and Castlebury was in progress at the time of the trial and although alternate jurors were available, we will not disturb the trial court's holding

that Mrs. Holley was a fair and impartial juror because it does not appear that the trial court was wrong.

ON PART 1 - ALL JUSTICES CONCUR, EXCEPT PRATHER, J., WHO TAKES NO PART.

II.

Appellant argues that the trial court erred in refusing Instruction D-12 which follows:

> The Court instructs the jury that, where there are two reasonable hypotheses arising out of and supported by the evidence, it is the duty of the jury to adopt the hypothesis consistent with innocence, even though the hypothesis of guilt be the more probable.

This argument is without merit because Instruction S-2A adequately instructed the jury on the State's burden of proof under the facts of the case. S-2A provides in part:

> If you believe from the evidence in this case beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence that . . . Mack Arthur King . . . did . . . kill and murder Lela Patterson . . . while . . . engaged in the commission of the crime of burglary, or in any attempt to commit burglary . . .

Appellant did not testify and his only defense was contained in a statement he made to the officers. He told the officers that when he left Mrs. Patterson's house, she was still alive, and that Willie Porter entered the house as he was leaving, and Porter later told appellant he had taken some property from Mrs. Patterson's house. This is the only hypothesis advanced by appellant consistent with his innocence.

To the contrary, a picture of Mrs. Patterson's body in the bathtub shows a considerable amount of blood in the bathtub, a white cloth found near the bathtub had blood type O on it, two other pictures show a red stain on a pillowcase on a bed, there was human blood on the trousers appellant was wearing during the burglary, human blood was found on a box that appellant had taken in the burglary and hidden beside appellant's home, and appellant had attempted to wash the blood out of his trousers. The pathologist testified that there was a laceration on the head which

extended down to the bone of the skull and that bloody froth was flowing freely from the nose and mouth of the victim. This evidence was consistent with the State's theory that appellant was the person who administered the blow to the head of the victim.

We hold that Instruction S-2A was proper, and adequately informed the jury of the law as applied to the facts in this case. It was not error for the court to refuse Instruction D-12.

ON PART II - ALL JUSTICES CONCUR, EXCEPT PRATHER J., WHO TAKES NO PART.

WALKER, PRESIDING JUSTICE, FOR THE COURT:

III.

Appellant's third assignment of error is that the court erred when it refused to allow defendant to amend Instruction D-7. Before the second phase of the trial, appellant submitted defendant's Instruction 7 which was accepted by the court. The instruction follows:

> You have found the Defendant guilty of the crime of capital Murder. You must now decide whether the Defendant will be sentenced to death or to life imprisonment. In reaching your decision, you must objectively consider the detailed circumstances of the offense for which the Defendant was convicted, and the character and record of the Defendant himself.
>
> To return the death penalty you must find that any aggravating circumstances -- those which tend to warrant the death penalty -- outweigh the mitigating circumstances -- those which tend to warrant the less severe penalty.
>
> Consider only the following elements of aggravation in determining whether the death penalty should be imposed:
>
> 1) The Capital Murder was committed while the Defendant was engaged in the commission of the crime of burglary or in an attempt to commit a burglary.
>
> 2) The Defendant committed the Capital Murder in an especially heinous, atrocious, and cruel manner.
>
> You must unanimously find, beyond a reasonable doubt, that one or more of the above aggravating circumstance(s) exist in this case to return the death penalty. If none of the elements are found to exist, the death penalty may not be imposed, and you shall write the following verdict on a sheet of paper:

"We, the jury, find that the Defendant shall be sentenced to life imprisonment."

If one or more of these elements of aggravation listed above is found to exist, then you must consider whether there are mitigating circumstances which outweigh the aggravating circumstance(s). Consider the following elements of mitigation in determining whether the death penalty should not be imposed.

1) All factors and circumstances surrounding the alleged crime,

or

2) The age of the Defendant,

or

3) The background of the Defendant,

or

4) Any other facts or circumstances that you consider relative or probative or act in mitigation.

Any other matter, and any other aspect of the Defendant's character and record, and any other circumstance of the offense brought before you during the trial of this case which you, the jury, determine to be mitigating on behalf of the Defendant.

If you find from the evidence that one or more of the preceding elements of mitigation exist, then you must consider whether it or they outweighs or overcomes the aggravating circumstance(s) you previously found, and you must return one of the following verdicts:

1) "We, the jury, unanimously find that the aggravating circumstance(s) or: (itemize and write out all of the aggravating circumstance(s) presented in this instruction which you unanimously agree exist in this case beyond a reasonable doubt).

_____

_____

_____

are sufficient to impose the death penalty and there are insufficient mitigating circumstance(s) to outweigh the aggravating circumstance(s). . . ."

If you find that mitigating circumstance(s) outweigh the aggravating circumstance(s) and agree to the sentence of life imprisonment, the form of your verdict should be as follows:

2) "We, the jury, find that the Defendant should be sentenced to life imprisonment."

If you find that the mitigating circumstance(s) outweigh the aggravating circumstance(s) and are unable to agree to the sentence of life imprisonment, the form your verdict should be as follows:

3) "We, the jury, have been unable to unanimously agree on punishment."

After argument the jury returned the following verdict:

"We, the jury, unanimously find that the aggravating circumstances

1) The Capital Murder was committed while the Defendant was engaged in the commission of the crime of burglary or in an attempt to commit a burglary.

2) The Defendant committed the capital murder in an especially heinous, atrocious and cruel manner."

are sufficient to impose the death penalty and there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

Thereafter, before the case was submitted to the jury at the sentencing phase, appellant's counsel made a motion to add to Instruction D-7 the following language:

If you are unable to unanimously agree on which circumstances outweigh the other, and arrive at a verdict fixing the punishment, then the form of your verdict should be as follows:

"We, the jury are unable to unanimously agree upon the punishment to be inflicted."

The motion to amend was overruled by the trial judge who stated that Instruction D-7 adequately informed the jury of the verdicts it might return.

We are of the opinion that no error was committed in refusing the appellant's requested amendment to his instruction.

First, the instruction, as given, informed the jurors that before they could sentence appellant to death, they must unanimously find one or more aggravating circumstance from the evidence beyond a reasonable doubt, and must further find there

were insufficient mitigating circumstances to outweigh the aggravating circumstances. After being so instructed, the jury returned the following unanimous verdict:

> We, the jury, unanimously find that the aggravating circumstances
>
> 1) The Capital Murder was committed while the Defendant was engaged in the commission of the crime of burglary or in an attempt to commit a burglary.
>
> 2) The Defendant committed the capital murder in an especially heinous, atrocious and cruel manner.
>
> are sufficient to impose the death penalty and there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

There was no indication in the record that they had any difficulty reaching an agreement.

Secondly, the defendant's argument that the jury was not fully instructed overlooks the statutory duty imposed on the court by Mississippi Code Annotated section 99-19-103 (Supp. 1981)[1] for the court to dismiss the jury after a reasonable period of deliberation and impose a life sentence on the defendant.

The argument creates an illusion of prejudice, which has no logical basis. If the jurors were unable to unanimously find that the aggravating circumstances were sufficient to impose the death penalty and that there were insufficient mitigating circumstances to outweigh the aggravating circumstances then they could not return a death sentence. Further, in the event they could not unanimously agree after a reasonable period of deliberation, it would be the trial judge's duty under Mississippi Code Annotated section 99-19-103 to dismiss the jury and

---

[1] Section 99-19-103 provides in part that, "If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life."

impose a sentence of life imprisonment on the defendant.

We have carefully considered the court's instructions in this case and are of the opinion that they fully instructed the jury on the applicable law.

We are also mindful of the recent decision in Jordan v. Watkins, No. 81-4172 (5th Cir., August 6, 1982), and are of the opinion that the sentencing phase instructions were so worded that the jury's discretion was suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action and channeled the jury's discretion by clear and objective standards providing specific and detailed guidance which make rationally reviewable the process for imposing a sentence of death. See Godfrey v. Georgia, 446 U.S. 420, 428, 100 S.Ct. 1759, 1764-65, 64 L.Ed.2d 398, 406 (1980).

We have meticulously reviewed the record and compared it with all of our decisions subsequent to Jackson v. State, 337 So.2d 1242 (Miss. 1976)[2] involving the death penalty. Some have been affirmed and some reversed. After such comparison, we conclude that the death penalty here is not excessive in the light of the aggravating and mitigating circumstances. We further find that the infliction of the death penalty on Mack Arthur King is not disproportinate, wanton or freakish when compared to cases involving similar crimes, the facts surrounding them and the defendants.

We also find that the sentence of death was not imposed under the influence of passion, prejudice or any other arbitrary factors, and, that the evidence overwhelmingly supports the jury's finding of statutory circumstances in that the capital murder was committed while the defendant was engaged in the commission of the crime of burglary or in an

---

[2] Death cases affirmed by this Court or reversed as to punishment and remanded for resentencing to life imprisonment attached as Appendix "A".

attempt to commit a burglary, and that the defendant committed the capital murder in an especially heinous, atrocious and cruel manner. The execution of King will be consistent and even-handed in the light of all post Jackson death penalty cases considered by this Court.

The judgment of the lower court is affirmed and Wednesday, December 8, 1982, is set as the date for execution of the sentence and infliction of the death penalty in the manner provided by law.

ON PART III - WALKER, P.J., BROOM, ROY NOBLE LEE, BOWLING, AND DAN LEE, JJ., CONCUR. SUGG, P.J., HAWKINS, J., PATTERSON, C.J., DISSENT. PRATHER, J., TAKES NO PART.

AFFIRMED AS TO GUILT PHASE; AFFIRMED AS TO SENTENCING PHASE AND WEDNESDAY, DECEMBER 8, 1982, IS SET AS THE DATE FOR EXECUTION OF THE SENTENCE AND INFLICTION OF THE DEATH PENALTY IN THE MANNER PROVIDED BY LAW.

APPENDIX "A"

DEATH CASES AFFIRMED BY THIS COURT:

Willie Albert Smith v. State, No. 53,564, handed down August 11, 1982, and not yet reported.

Edwards v. State, 413 So.2d 1007 (Miss. 1982).

Johnson v. State, 416 So.2d 383 (Miss. 1982)

Bullock v. State, 391 So.2d 601 (Miss. 1980)

Reddix v. State, 381 So.2d 999 (Miss. 1980)

Jones v. State, 381 So.2d 983 (Miss. 1980).

Culberson v. State, 379 So.2d 499 (Miss. 1979)

Gray v. State, 375 So.2d 994 (Miss. 1979)

Jordan v. State, 365 So.2d 1198 (Miss. 1978)

Voyles v. State, 362 So.2d 1236 (Miss. 1978)

Irving v. State, 361 So.2d 1360 (Miss. 1978)

Washington v. State, 361 So.2d 61 (Miss. 1978)

Bell v. State, 360 So.2d 1206 (Miss. 1978).

DEATH CASE REVERSED AS TO PUNISHMENT AND REMANDED FOR RESENTENCING TO LIFE IMPRISONMENT.

Coleman v. State, 378 So.2d 640 (Miss. 1979)

IN THE SUPREME COURT OF MISSISSIPPI

NO. 53,027

MACK ARTHUR KING

V.

STATE OF MISSISSIPPI

EN BANC

SUGG, PRESIDING JUSTICE, DISSENTING IN PART III

I dissent from the holding of the majority in Part III for the reasons stated hereafter.

Before the case was submitted to the jury at the sentencing phase, appellant's counsel moved to add to the instruction the following language:

> If you are unable to unanimously agree on which circumstances outweigh the other, and arrive at a verdict fixing punishment, then the form of your verdict should be as follows:
>
> We, the jury, are unable to unanimously agree upon the punishment to be inflicted.

The motion to amend was overruled by the trial judge because he was of the opinion that Instruction D-7 adequately informed the jury of the verdicts it might return. Instruction D-7 is the same as State's Instruction S-7, which was withdrawn, except it includes four mitigating factors which might be considered by the jury.

By way of summary, D-7 instructed the Jury:

(1) Before the jury could return the death penalty, it must unanimously find one or more aggravating circumstances which outweigh the mitigating circumstances.

(2) If no aggravating circumstances were found, the death penalty might not be imposed and the jury should sentence

the defendant to life imprisonment.

(3) If the jury found that mitigating circumstances outweighed aggravating circumstances, and agreed to the sentence of life imprisonment, the jury should sentence the defendant to life imprisonment.

(4) If the jury found the mitigating circumstances outweighed the aggravating circumstances but were unable to agree on the sentence of life imprisonment, the form of the verdict should be, "We, the jury, have been unable to unanimously agree on punishment."

Although the instruction as given informed the jury that before it could sentence appellant to death, it must unanimously find one or more aggravating circumstances from the evidence beyond a reasonable doubt, and must further find there were insufficient mitigating circumstances to outweigh the aggravating circumstances, it was not instructed as to the verdict it could return if unable to unanimously agree on which circumstances outweighed the other.

The requested amendment would have cured this deficiency and should have been granted. In Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) the Court stated that a state must channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance. Instruction D-7 without the requested amendment simply did not tell the jury what verdict it could return if the jurors were unable to unanimously agree on which circumstances outweighed the other. I would remand for resentencing under a proper instruction.

PATTERSON, C.J., AND HAWKINS, J., JOIN IN THIS DISSENT.

PRATHER, J., TAKES NO PART.

IN THE SUPREME COURT OF MISSISSIPPI

NO. 53,027

MACK ARTHUR KING

V.

STATE OF MISSISSIPPI

HAWKINS, JUSTICE, DISSENTING:

I concur with Justice Sugg that the instruction was defective, that the trial court was in error in refusing to grant the amendment requested by defense counsel, and that this case should be remanded for hearing before another jury to determine the issue whether the defendant should receive the death penalty or life imprisonment.

In my view the instruction contains an additional defect.

While Miss. Code Ann. § 99-19-101 (Supp. 1981) sets forth objective guidelines to be considered by the jury before they will be authorized to inflict the death penalty, I see no legislative intent that upon finding such conditions to exist the jury in some way is obligated to inflict the death penalty. In my view the sentencing jury should be instructed that after considering the aggravating and mitigating circumstances, if they wish to sentence the defendant to life imprisonment they have the right to do so.

The model instruction heretofore approved by this Court, and the instruction which essentially was granted by the circuit judge in this case, does not clearly give the jury this initial discretion, after examination of the evidence, to sentence the accused to life imprisonment, regardless of whether there are aggravating circumstances and no mitigating circumstances, or whether the aggravating circumstances outweigh the mitigating circumstances.

I believe the sentencing jury should have the prerogative, spelled out in the instruction, that regardless of the proof, it is nevertheless in their discretion, if they choose, to sentence the accused to life imprisonment.

This has been our concept of the function of the jury in death penalty cases for over a century. I see no U.S. Supreme Court authority which changes this salutary concept. Nor does § 99-19-101, to my mind, suggest the contrary.

On this point, Spain v. State, 59 Miss. 19 (1881), provides an interesting corollary. In 1872, the Legislature passed an act providing that conscientious scruples against the infliction of the death penalty would not disqualify a person from being a juror in a capital murder case. In 1875, the Legislature repealed the 1872 act, but the right of the jury to fix the punishment at imprisonment for life was declared. Following trial, Spain's jury found him guilty but recommended mercy. According to the opinion, the following transpired:

> . . .the court ordered the jury to be conducted back to their room, apprising them that they would find a form for their verdict in the second charge for the State. This instruction is that, if the jury simply find the accused guilty as charged in the indictment, it will be the duty of the court to pronounce the death penalty; but, if the evidence in the case warrants them in so doing, they may find him guilty as charged, "and declare that the punishment to be inflicted shall be imprisonment in the penitentiary for life," or they may find the defendant not guilty. Afterwards the jury rendered a verdict of guilty as charged, and the appellant was sentenced to be hanged.

Id. at 19-20.

The instruction was condemned because it ". . .made the right of the jury to fix the punishment to depend on its view that the evidence warranted it, . . ." Id. at 25. We said:

> The judgment must be reversed, because of the second instruction given at the instance of the State. It limits and qualifies the right

> of the jury to fix the punishment at imprisonment for life, whereas the law confers on the jury this right without qualification or restriction. The right of the jury to fix the punishment as indicated is without any condition. The most atrocious crime committed under the most aggravating circumstances may be punished by imprisonment for life, instead of by death, if the jury so determines by its verdict. The law demands a jury willing to be the instrument of visiting the penalty of death, and confers on such a jury the unconditional right to fix the punishment at imprisonment for life. It was erroneous to instruct the jury that its right was dependent on any state of the evidence or on any view it might take of it.

Id. at 24.

I do not contend that the model instruction contains the blatant error as was in the instruction condemned in Spain. I concede it may be argued, and perhaps with some persuasion, that the model instruction gives the jury the unconditional right to sentence the accused to life imprisonment regardless of the evidence. This right of the jury, however, is not clearly and affirmatively set out therein, in my view.

As we said in Spain, the law demands a jury willing to be the instrument visiting the penalty of death, but also confers on such jury the unconditional right to fix the punishment at life imprisonment. This right vested in the trial jury should be clearly spelled out by court instruction.

Attached as an appendix is a proposed instruction which incorporates my view and the view of Justice Sugg.

APPENDIX

CAPITAL MURDER SENTENCING PHASE

The defendant has been found guilty of the crime of capital murder. You must now decide whether the defendant will be sentenced to death or to life imprisonment. In reaching your decision you should consider the detailed circumstances of the offense for which the defendant was convicted, and the defendant himself.

The ultimate determination of whether the defendant shall suffer death or life imprisonment is for you and you alone to decide. The instructions given here, however, must be followed before you are authorized to inflict the death penalty.

You must first deliberate and find from the evidence beyond a reasonable doubt whether any one or more of the following aggravating circumstances exist in this case:

(List aggravating circumstances)

If you are not unanimous in your agreement beyond all reasonable doubt that at least one of the above aggravating circumstances exist in this case, the death penalty may not be imposed, and it will be your duty in such event to return into open court the following verdict written upon a separate sheet of paper:

"We, the jury, find that the defendant shall be sentenced to life imprisonment."

If you do unanimously believe beyond a reasonable doubt that any one or more of the above aggravating circumstances exist in this case, you must then consider whether there are mitigating circumstances which should be weighed in making your determination.

The mitigating circumstances which you may consider in determining whether or not the death penalty should be imposed are as follows:

(List mitigating circumstances)

After taking the above factors into consideration, if you are of the opinion the defendant should be sentenced to life imprisonment, you should return into open court the following verdict written upon a separate sheet of paper:

"We, the jury, find that the defendant shall be sentenced to life imprisonment."

On the other hand, before you would be authorized to administer the death penalty, you must proceed to weigh the aggravating circumstances and the mitigating circumstances, one against the other, to determine beyond all reasonable doubt from the evidence in this case whether the aggravating circumstances, if any, outweigh the mitigating circumstances.

If you unanimously find from the evidence, beyond a reasonable doubt, that any one or more of the aggravating circumstances listed above, if any, outweigh the mitigating circumstances, one against the other, and from such determination that the death penalty should be imposed, your verdict should be written on a separate sheet of paper, signed by your foreman, and in the following form:

"We,the jury, find unanimously and beyond a reasonable doubt the following aggravating circumstances:

(List the aggravating circumstances, if any, which you unanimously find beyond a reasonable doubt from those listed above in the same language as they are listed.)

"We,the jury, further find unanimously from the evidence and beyond a

reasonable doubt that after weighing the mitigating circumstances and the aggravating circumstances, one against the other, that the mitigating circumstances do not outweigh the aggravating circumstances and that the defendant should suffer the penalty of death."

FOREMAN OF THE JURY

If you fail to find any aggravating circumstance unanimously and beyond a reasonable doubt, or, if you find one or more aggravating circumstances unanimously and beyond a reasonable doubt, but after weighing the mitigating circumstances and the aggravating circumstances, one against the other, you fail to unanimously find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances, then your verdict shall be written on a separate sheet of paper and be in the following form:

"We, the jury, find that the defendant should be sentenced to imprisonment for life in the state penitentiary."

If you are unable to unanimously agree on which circumstances outweigh the other, and arrive at a verdict fixing the punishment, then the form of your verdict should be as follows:

"We, the jury, are unable to unanimously agree upon the punishment to be inflicted."

If, after reasonable deliberation, you cannot agree as to the punishment, you should certify your disagreement to the Court and the Court shall, under the law, impose a sentence

of imprisonment for life. Your verdict shall be written on a separate sheet of paper in the following form:

"We, the jury, after due deliberation, have been unable to agree upon the punishment and hereby so certify and request the Court to dismiss the jury from further deliberation."

NOTE: The changes from the model instruction have been italicized.

PATTERSON, C.J. JOINS THIS DISSENT.

IN THE SUPREME COURT OF MISSISSIPPI
DECISIONS HANDED DOWN DECEMBER 1, 1982

PRATHER, J.

X 53,933 William J. Dunaway and Mary Lee Dunaway v. W. H. Hopper & Associates, Inc., et al.; Chancery, DeSoto; Reversed and Remanded.

HAWKINS, J.

X 53,408 thru 53,410 thru 53,418 & 53,508 & 53,630 Mississippi Employment Security Commission v. City of Columbus Light & Water, et al.; Circuit, Hinds; Affirmed in Part, Reversed in Part and Rendered. Bowling and Dan Lee, JJ., Took No Part.

X 53,536 Jerry L. Brown & Linda L. Brown v. Blue Cross & Blue Shield of Miss., Inc., et al.; Circuit, Marion; Reversed and Remanded for Trial. Prather, J., Took No Part.

BOWLING, J.

X 53,519 In the Matter of the Est. of Roy C. Atkins, Sr., Dec'd.: George William Atkins, Executor v. Edna Sartin; Chancery, Hinds; Affirmed on Direct and Cross-Appeals.

53,467 Mrs. Jacquelyn Clark White, et al. v. Hutchinson Mfg., Inc.; Circuit, Wilkinson; Reversed and Remanded.

53,906 Charles Albert Armstrong v. State; Circuit, Hinds; Conviction of Arson and Sentence of Twenty (20) Years, with Thirteen (13) Years Suspended, Affirmed.

WALKER, P.J.

XX 53,399 In Re: The Est. of Mack Kidd, Dec'd., Emma Gunn Webber v. John H. Kidd; Chancery, Clay; Affirmed. Walker, P.J., Sugg, P.J., Broom and Roy Noble Lee, JJ., Concur; Dan Lee, J., Patterson, C.J., Bowling and Hawkins, JJ., Dissent; Prather, J., Took No Part.

X 53,886 A. Copeland Enterprises v. Pickett & Meador, Inc.; Circuit, Forrest; Reversed and Rendered.

SUGG, P.J.

53,883 Robyn Sabrina Russell v. State; Circuit, Leflore; Conviction of Armed Robbery and Sentence of Twenty (20) Years Affirmed.

THE COURT SITTING EN BANC:

53,027 Mack Arthur King v. State; Circuit, Lowndes; Petition for Rehearing Denied. Patterson, C.J., Sugg, P.J., and Hawkins, J., Dissent; Prather, J., Took No Part.

53,711 Mrs. Ola Mae Russell v. Orkin Extermination Co., Inc., et al.; Circuit, Lauderdale; Petition for Rehearing Denied.

53,787 Mary Hendricks, et al. v. Dykes L. James, et al.; Chancery, Lincoln; Petition for Rehearing Denied.

53,849 Charles Wright, et al. v. Mayor and Commissioners of the City of Jackson, Miss., and Dr. Michael R. Smith; Circuit, Hinds; Petition for Rehearing Denied.

IN THE SUPREME COURT OF MISSISSIPPI
DECISIONS HANDED DOWN DECEMBER 1, 1982
(Continued - Page 2)

THE COURT SITTING EN BANC (Cont'd):

Misc. #1317 Charles Dane Leathers v. Thomas J. Gardner, III and Mrs. Fay Estes; Motion for Clarification of Court's Opinion Overruled. Bowling, J., Dissents; Roy Noble Lee and Dan Lee, JJ., Took No Part.

Misc. #1452 Carolyn Brewer Warden v. James Harold Warden; Petition for Rehearing on Motion for Writ of Mandamus Denied.

PER CURIAM:

53,925 Jennie Jennings v. Estate of Bobby G. Jennings, Deceased, Jean G. Jennings, Executrix; Motion for Reasonable Attorney's Fees Overruled.

54,231 The Estate of Gertrude W. Kemp, Deceased v. J. W. Thornton & Ivan Bryan; Motion of Appellant to Dismiss Appeal Sustained.

54,232 Harrison C. Springer and Donna Mae Springer v. Walter L. Jackson, Jr.; Motion of Appellee to Dismiss Appeal for Lack of Prosecution Sustained.

54,305 Colt Industries, d/b/a Holley Carburetor, Self-Insured v. Thelma Williams; Motion of Non-Resident Attorney for Permission to Appear specially in this Case Sustained.

CC1852 Tommy Dean Franklin v. State; Circuit Court, Harrison; Suggestion of Death Noted on Record, and Motion to Dismiss Appeal Sustained.

CC1938 Joan Johnson a/k/a "Pee Wee" v. State; Circuit Court, Harrison; Suggestion of Death Noted on Record, and Motion to Dismiss Appeal Sustained.

Misc. #1430 Robert Earl McCoy v. State; Petition for Production of Records Denied. Application for Leave to File Petition for Writ of Error Coram Nobis Denied.

Misc. #1473 Henrietta W. Bell v. Official Court Reporter and Circuit Clerk of Hancock County; Petition for Writ of Certiorari to Ms. Elaine Cherota, Official Court Reporter of the 2nd Circuit Court District and the Circuit Clerk of Hancock County, Mississippi Sustained.

ONLY CASES MARKED "X" HAVE WRITTEN OPINIONS.

Respectfully submitted,

Robert E. Womack, Clerk
Yvonne Burnham, D. C.

APPENDIX C

SUPREME COURT OF MISSISSIPPI

NEVILLE PATTERSON
CHIEF JUSTICE

L. C. SMITH, JR.
R. P. SUGG
PRESIDING JUSTICES

HARRY G. WALKER
VERNON R. BROOM
ROY NOBLE LEE
FRANCIS S. BOWLING
ARNIS E. HAWKINS
DAN M. LEE
JUSTICES

MARTIN R. McLENDON
EXECUTIVE AND STAFF

JACKSON 39205

30 JUNE 1982

TELEPHONE 354-6511
POST OFFICE BOX 117

Attorney General Bill Allain
P. O. Box 220
Jackson, Mississippi

Attn: Mrs. Carolyn Mills

Dear Mr. Allain:

Re: Mack Arthur King v. State,
No. 53,027

The Court has directed that I request there be filed on behalf of the State within ten (10) days of the date of this letter a written response to the following questions:

(1) Did the trial court err in overruling appellant's motion to add to Instruction D-7 the following language?

"If you are unable to unanimously agree on which circumstances outweigh the other, and arrive at a verdict fixing the punishment, then the form of your verdict should be as follows:
We, the jury are unable to unanimously agree upon the punishment to be inflicted."

(2) Should the instruction have included directions to the jury that if it found the aggravating circumstances outweighed the mitigating circumstances the jury might impose the death sentence, but if the jury finds that the mitigating circumstances outweighed the aggravating circumstances, it should not impose the death sentence? In discussing both questions, comment is invited on the quoted portions from the opinions in Coleman v. State, 378 So.2d 640 (Miss. 1979) and Gray v. Lucas, No. 81-0418, Slip Opinion 2850, 2873-4 (5th Circuit, June 10, 1982).

Coleman v. State, 378 So. 2d at 646:

(8) The appellant contends that the capital murder statute (Section 99-19-101) unconstitutionally shifts the burden of proof to the defendant during the separate sentencing phase because the evidence adduced during the guilt phase of the trial proving murder during the commission of a burglary also proves an aggravating circumstance, thus requiring the defendant to come forward with proof of mitigating circumstances or automatically have the death penalty imposed. This contention is without merit because the statute does not automatically require the jury to impose death when aggravating circumstances are shown in the absence of mitigating circumstances.

Gray v. Lucas, Slip opinion at 2873 and 2874:

Fifth, Gray argues that once an aggravating factor is established by the state, the burden of proof is impermissibly shifted to the defendant. Gray contends that to avoid the death penalty, the defendant must show that the mitigating factors outweigh the aggravating factors. Gray argues that this allocation of proof creates an unconstitutional presumption of death.

[28-31] Gray's argument, however, is based on a misapprehension of the applicable state law. Section 99-19-103 of the Mississippi Code provides that the jury may not impose the death penalty unless it finds that at least one statutory aggravating circumstance exists and that the aggravating circumstances are not outweighed by the mitigating circumstances. See Miss. Code Ann. §99-19-103. The burden of proving an aggravating circumstance exists as part of the prosecution's general bundle. Gray v. State, 351 So.2d 1342, 1345 (Miss. 1977)(appeal from Gray's first trial). The defendant is permitted but not required to offer any relevant mitigating circumstances not encompassed in the prosecutor's presentation. No burden of proof or persuasion is assigned, just as the defendant's option to develop proof of alibi, good character, or, in this case, mental instability does not operate to shift the burden of proof, so the choice to present any number or kind of mitigating circumstances does not. Moreover, even

if the jury finds that the aggravating circumstances outweigh the mitigating circumstances, it is not required to impose the death penalty. It may still sentence a defendant to life imprisonment. See, Coleman v. State, 378 So.2d 640, 647 (Miss. 1979). Thus, the statutory procedures act only to require the prosecution to build the aggravating circumstance bridge the jury must cross to be entitled to impose the death penalty. Cf. Stevens v. Zant, _____ U.S. _____, 102 S.Ct. 1856, 71 L.Ed 2d _____ (1982). They do not limit its ability to impose a life sentence. Every mandatory element of proof is assigned to the prosecution. Neither the burden of production nor the burden of proof ever shifts to the defendant.

16. The trial judge's instructions carefully adhered to this distinction. He advised the jury

> you shall weigh the aggravating circumstances, if any, and the mitigating circumstances, if any, one against the other, and in the event that you find that the aggravating circumstances outweigh the mitigating circumstances you may impose the death sentence, but should you find that the mitigating circumstances overcome the aggravating circumstances, then in that event, you shall not impose the death sentence. (emphasis added).

The trial judge's careful use of "may" and "shall not" indicates that a finding that the aggravating circumstances outweigh the mitigating circumstances allows, but does not require the jury to impose the death penalty.

Appellant will be given five (5) days in which to reply to the State's response.

Sincerely yours,

FOR THE COURT

Martin R. McLendon

M/j
cc: Hon. Joe O. Sams, Jr.
Hon. Thomas L. Kesler

Supreme Court Clerk

APPENDIX D

§ 99-19-101. Jury to determine punishment in capital cases in separate sentencing proceeding; aggravating and mitigating circumstances to be considered.

(1) Upon conviction or adjudication of guilt of a defendant of capital murder or other capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a jury to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Mississippi. The state and the defendant and/or his counsel shall be permitted to present arguments for or against the sentence of death.

(2) After hearing all the evidence, the jury shall deliberate on the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5) of this section;

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6) of this section, which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) For the jury to impose a sentence of death, it must unanimously find in writing the following:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5) of this section; and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the jury imposes the death sentence, the determination of the jury shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) of this section and upon the records of the trial and the sentencing proceedings. If the jury does not make the findings requiring the death sentence, the court shall impose a sentence of life imprisonment.

(4) The judgment of conviction and sentence of death shall be subject to automatic review by the supreme court of Mississippi within sixty (60) days after certification by the

sentencing court of entire record, unless the time is extended for an additional period by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) Aggravating circumstances shall be limited to the following:

(a) The capital offense was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy or the unlawful use or detonation of a bomb or explosive device.

(e) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital offense was committed for pecuniary gain.

(g) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital offense was especially heinous, atrocious or cruel.

(6) Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

§ 99-19-105. Review by supreme court of imposition of death penalty.

(1) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Mississippi Supreme Court. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Mississippi Supreme Court together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Mississippi Supreme Court, a copy of which shall be served upon counsel for the state and counsel for the defendant.

(2) The Mississippi Supreme Court shall consider the punishment as well as any errors enumerated by way of appeal.

(3) With regard to the sentence, the court shall determine:

(a) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;

(b) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 99-19-101; and

(c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(4) Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(5) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(a) Affirm the sentence of death; or

(b) Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

(6) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

JANE ANDERSON,

A WITNESS FOR THE STATE OF MISSISSIPPI, HAVING BEEN PREVIOUSLY SWORN, TESTIFIED AS FOLLOWS IN THE AGGRAVATING EVIDENCE PHASE:

DIRECT EXAMINATION

MR. HOWARD:

Q YOU ARE JANE ANDERSON?

A YES, SIR.

Q AND YOU ARE THE DAUGHTER OF THE DECEASED, MRS. LELA PATTERSON, IS THAT CORRECT?

A YES, SIR, I AM.

Q HOW MANY CHILDREN DID SHE HAVE, JANE?

A FIVE.

Q WHAT --WHAT ARE THEIR NAMES?

A CATHERINE, TROY, BETTY, BILLIE, AND ME.

Q HOW --I BELIEVE YOU TESTIFIED BEFORE YOUR MOTHER WAS EIGHTY-FOUR, IS THAT CORRECT --

A YES, SIR.

Q --AT HER --AT HER DEATH?

A YES, SIR.

Q WHAT TYPE OF PHYSICAL CONDITION WAS SHE IN AS FAR AS UP AND BEING ABLE TO GET AROUND OR MOVE AROUND WHEN SHE WAS KILLED?

A SHE WAS IN REAL GOOD SHAPE; SHE WAS REAL HEALTHY; SHE COULDN'T SEE WITHOUT HER GLASSES, AND SHE COULDN'T HEAR REAL WELL, BUT SHE COULD HEAR PRETTY GOOD, BUT SHE WAS HEALTHYWISE; SHE WAS IN REAL GOOD SHAPE. SHE HAD A GARDEN THIS YEAR HERSELF, AND SHE WORKED IN THE YARD WITH HER FLOWERS SOME.

Q I'LL ASK YOU WHETHER OR NOT SHE WAS OF SUCH

PHYSICAL CONDITION AS TO WHETHER OR NOT A YOUNGER PERSON COULD HAVE MANHANDLED HER PRETTY WELL OR BEEN ABLE TO PUSH HER AROUND OR THINGS OF THIS NATURE?

A WELL, SHE WAS PRETTY STRONG, BUT I MEAN, IF THEY WERE STRONG I FEEL LIKE THEY COULD HAVE, YES, SIR.

Q DO YOU FEEL THAT THE KILLING OF YOUR MOTHER WAS A SENSELESS KILLING?

A YES, SIR, I DO; HE --SHE WOULD HAVE GIVEN ANYBODY ANYTHING THEY WANTED.

Q DO YOU FEEL THAT THE MANNER IN WHICH SHE MET HER DEATH WAS A SPECIALLY CRUEL MANNER OF DEATH?

A VERY MUCH SO.

MR. HOWARD:

NOTHING FURTHER OF THIS WITNESS, YOUR HONOR.

THE COURT:

ANY CROSS?

MR. SAMS:

NO CROSS.

THE COURT:

YOU MAY STEP DOWN; YOU MAY REMAIN IN THE COURTROOM.

BILLIE YEAROUT,

A WITNESS FOR THE STATE OF MISSISSIPPI, HAVING BEEN DULY SWORN BY DEPUTY CLERK, JOHN WIGGINS, TESTIFIED AS FOLLOWS IN THE AGGRAVATING EVIDENCE PHASE:

DIRECT EXAMINATION

MR. HOWARD:

Q WOULD YOU TELL THE LADIES AND GENTLEMEN OF THE JURY WHAT YOUR NAME IS, PLEASE?

A BILLIE YEAROUT.

Q ARE YOU ONE OF THE CHILDREN OF THE LATE MRS. LELA

PATTERSON?

A Yes, I am.

Q I'll ask you whether or not you feel that the killing of your mother in this particular instance was an especially cruel type of killing?

A Yes, I do.

Q Based on the injury afflicted on your mother, do you feel that someone would have been able to have taken what they wanted from her without actually killing her?

A Yes.

MR. HOWARD:

Nothing further of this witness, your Honor.

THE COURT:

Any cross?

MR. SAMS:

No cross.

CHARLES HUGHES,

A witness for the State of Mississippi, having been duly sworn by Deputy Clerk, John Wiggins, testified as follows in the aggravating evidence phase:

DIRECT EXAMINATION

MR. HOWARD:

Q Would you tell the ladies and gentlemen of the jury what your name is, please?

A Charles Hughes.

Q Where do you live, Mr. Hughes?

A I live on Route 8, Box --Box 245 just about a little over a quarter of a mile from Lela Patterson's home.

Q Did you know Mrs. Patterson during her lifetime, Charles?

A IT'S MY SISTER.

Q WOULD YOU TELL THE LADIES AND GENTLEMEN OF THE JURY WHAT HER --WHAT HER PHYSICAL CONDITION WAS AT THE TIME OF HER DEATH?

A SHE WAS IN PRETTY GOOD SHAPE PHYSICALLY CONSIDERING HER AGE, BUT SHE COULDN'T HARDLY SEE.

Q ANY WHY WAS THAT?

A WELL, SHE HAD HAD AN OPERATION ON BOTH EYES FOR CATARACTS; SHE HAD LOT OF TROUBLE SEEING, BUT OTHER THAN THAT FOR A PERSON EIGHT-FOUR YEARS OLD SHE WAS IN PRETTY GOOD PHYSICAL CONDITION.

Q WELL, BASED ON HER AGE AND HER LACK OF SIGHT IN HER EYES, DO YOU FEEL THAT SOMEONE WOULD HAVE BEEN ABLE TO HAVE TAKEN ANYTHING THEY WANTED FROM HER WITHOUT THE NECESSITY OF KILLING HER?

A EASILY.

MR. HOWARD:

NOTHING FURTHER OF THIS WITNESS, YOUR HONOR.

THE COURT:

ANY CROSS?

MR. SAMS:

NO CROSS.

TROY PATTERSON,

A WITNESS FOR THE STATE OF MISSISSIPPI, HAVING BEEN PREVIOUSLY SWORN, TESTIFIED AS FOLLOWS IN THE AGGRAVATING EVIDENCE PHASE:

DIRECT EXAMINATION

MR. HOWARD:

Q YOU ARE TROY PATTERSON?

A YES, SIR.

Q YOU ARE TROY PATTERSON?

A YES.

Q AND YOU HAVE PREVIOUSLY TESTIFIED IN THIS CAUSE, IS THAT CORRECT?

A YES.

Q AND WHAT RELATION WAS MRS. LELA PATTERSON TO YOU, TROY?

A SHE IS MY MOTHER.

Q BASED ON YOUR MOTHER'S AGE, AND HER SIGHT IMPAIRMENT DO YOU FEEL THAT HER KILLING WAS AN ESPECIALLY HEINOUS AND ATROCIOUS OR CRUEL KILLING?

A YES, I DO.

Q DO YOU FEEL THAT SOMEONE COULD HAVE TAKEN ANYTHING THEY WANTED FROM HER WITHOUT THE NECESSITY OF HAVING KILLED HER?

A THEY COULD.

MR. HOWARD:

NOTHING FURTHER, YOUR HONOR.

MR. SAMS:

NO CROSS.

CINDY ANDERSON,

A WITNESS FOR THE STATE OF MISSISSIPPI, HAVING BEEN DULY SWORN BY DEPUTY CLERK, JOHN WIGGINS, TESTIFIED AS FOLLOWS IN THE AGGRAVATING EVIDENCE PHASE:

DIRECT EXAMINATION

MR. HOWARD:

Q WOULD YOU STATE YOUR NAME FOR THE LADIES AND GENTLEMEN OF THE JURY, PLEASE?

A CINDY ANDERSON.

Q AND WHERE DO YOU LIVE?

A IN CANDLEWOOD APARTMENTS.

THE COURT:

SPEAK OUT A LITTLE LOUDER.

Q IS THAT HERE IN COLUMBUS?

A YES, SIR.

Q YOU HAVE TO SPEAK UP INTO THE MICROPHONE A LITTLE BIT, CINDY.

A OKAY.

Q DO YOU KNOW OR DID YOU KNOW LELA PATTERSON DURING HER LIFETIME?

A YES, SIR.

Q AND WHAT RELATIONSHIP WAS SHE TO YOU?

A SHE WAS MY GRANDMOTHER.

Q DID YOU OFTEN VISIT WITH YOUR GRANDMOTHER?

A YES, SIR.

Q I'LL ASK YOU WHETHER OR NOT YOU WERE FAMILIAR WITH A LITTLE GOLD NECKLACE WITH JADE BEADS ON IT THAT YOUR GRANDMOTHER WORE?

A YES, SIR.

Q HOW OFTEN DID SHE WEAR THAT?

A CONSTANTLY.

Q COULD SHE TAKE IT OFF?

A NO, SIR.

Q WHO HAD TO TAKE IT OFF FOR HER WHEN SHE TOOK IT OFF?

A USUALLY MY MOTHER OR SHE WOULD GET SOMEONE ELSE TO.

Q DID YOU HELP HER TAKE IT OFF ON OCCASION?

A I TOOK IT OFF ONCE I BELIEVE.

Q WHY COULDN'T SHE TAKE IT OFF HERSELF?

A BECAUSE OF HER ARTHRITIS.

Q COULD SHE MANIPULATE HER FINGERS TO TAKE HER JEWELRY OFF --THE NECKLACE OFF HER NECK?

A NO, SIR.

Q BASED ON YOUR GRANDMOTHER'S AGE DO YOU FEEL THAT HER KILLING WAS AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL KILLING?

A YES, SIR.

Q DO YOU FEEL THAT ANYONE COULD HAVE GOTTEN WHAT THEY WANTED FROM HER WITHOUT ACTUALLY HAVING TO KILL HER?

A CERTAINLY.

MR. HOWARD:

NOTHING FURTHER OF THIS WITNESS, YOUR HONOR.

THE COURT:

ANY CROSS?

MR. SAMS:

NO CROSS-EXAMINATION.

THE COURT:

YOU MAY STEP DOWN.

ANYTHING FURTHER.

MR. HOWARD:

YOUR HONOR, IN ADDITION TO THIS THE STATE WOULD MOVE TO RE-INTRODUCE IN THIS HEARING ALL OF THE EVIDENCE ADDUCED BOTH YESTERDAY AND TODAY DURING THE COURSE OF THE TRIAL AND RE-INTRODUCE ALL OF THE EXHIBITS PRESENTED DURING THE TRIAL, YOUR HONOR.

THE COURT:

ALL RIGHT. YOU MAY PROCEED, MR. SAMS.

MR. SAMS:

MAY I HAVE THE COURT'S INDULGENCE?

(CONFERENCE AT DEFENSE TABLE)

APPENDIX F

IN THE SUPREME COURT OF MISSISSIPPI
NO. 53,754

CONNIE RAY EVANS

V.

STATE OF MISSISSIPPI

EN BANC.

ROY NOBLE LEE, JUSTICE, FOR THE COURT:

Connie Ray Evans and Alfonso Artis were jointly indicted in the Circuit Court of the First Judicial District of Hinds County, Honorable William F. Coleman, presiding, on a charge of capital murder. Evans entered a plea of guilty to the charge and the trial proceeded on the sentencing phase. After hearing the evidence, the jury found Evans guilty and sentenced him to death. He has appealed and assigns ten (10) errors in the trial below.

FACTS

Connie Ray Evans was twenty-one (21) years of age at the time of the homicide. On the night of April 7, 1981, he and Alfonso Artis, age twenty-four (24), met at the Alamo Theater on Farish Street in the City of Jackson, Mississippi, and planned to rob R.J.'s Food Center on Lynch Street. They considered the fact that gunplay might be involved in the robbery. About 6:30 the following morning, Artis went to the house where Evans lived with his mother and stepfather, and they left together for the R.J. Food Center. Upon arrival there, they walked by the store on two occasions but did not enter because customers were present. After waiting approximately one-half hour, they began the robbery. Artis went

inside with a gun while Evans waited outside and watched for trouble. Artis drew the gun on Arun Pahwa, the store attendant, and forced him at gunpoint to get on his knees behind the counter. Evans entered the store, received the gun from Artis, held it on Pahwa and guarded him while Artis checked the cash register. Artis could not open the cash drawer, and Pahwa was made to get up from the floor, open the cash register and then was forced to kneel again. Artis collected money from the cash register and then searched and emptied Pahwa's pockets and wallet.

Evans shot Pahwa in the head as he knelt motionless behind the counter and the two ran out the door. They had obtained approximately one hundred forty dollars ($140.00) in the robbery. Artis took off his shirt and wrapped the gun in it as they ran. Later, he gave the gun to Evans, who wiped away some of the fingerprints, and they hitchhiked to appellant's brother's house where Evans hid the gun behind a clock. They left there, caught a bus to the downtown area, and spent most of the money on new clothes. That night, they went to a movie, drank beer at a local club, then separated and went home. Evans told Artis that he shot Pahwa because "I was cold hearted."

The police were notified of the robbery and murder and went to the scene where they found the cash drawer open and Pahwa lying behind the counter in a pool of blood. The cause of death was a gunshot wound in the head. As a result of the police investigation, Artis was apprehended on the night of April 8, 1981, and Evans was arrested seventeen (17) days later on April 25, 1981. He stayed on the streets during this time and finally telephoned his mother and decided to give himself up. Evans gave a written confession to the crime. Artis pled guilty to charges of armed robbery and manslaughter and received a sentence of twenty (20) years, with fifteen (15) years suspended. He testified for the State on the trial.

LAW

I.

Did the trial court err in striking for cause a juror who was irrevocably committed to vote against the death penalty regardless of the facts and circumstances presented?

On voir dire examination, a female juror stated that she had conscientious scruples against the infliction of the death penalty; and that she had strong feelings about sending somebody to jail or giving them the death penalty. She said:

Q. I would assume that the lesser of the two would be to send someone to jail, so are you sure that you couldn't sentence someone to death?

A. I am positive.

Q. You are positive you couldn't return a verdict recommending the death penalty, is that correct?

A. Yes, sir.

The prospective juror qualified her feeling against the death penalty by saying that, if a person had killed several people she probably could vote for the death penalty. Also, she vacillated some when interrogated by the appellant's attorney. She responded further:

Q. I see. So a murder in the process of a robbery you could not vote for the death penalty under any circumstances, is that correct?

A. (Juror nodded)

* * * *

Q. No question in your mind about that? You could not follow the law if the law was that you are to consider the death penalty and you decide on whether or not it's a bad enough case, and you couldn't even consider it if it was just one person killed?

A. If someone killed someone else, like I said, out of fear because they had robbed a store, no.

Q. I'm not asking you in self-defense or anything like that. Self-defense we wouldn't be here. He wouldn't have pled guilty.

A. (Juror nodded negatively).

Q. Your answer is still no, you could not consider it?

A. (Juror nodded negatively).

Q. Under any circumstances?

A. (Juror nodded).

The principle involved here was stated in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). It has been followed many times, and recently in Edwards v. State, 413 So. 2d 1007 (Miss. 1982), where the Court said:

> First argument made relates to the exclusion of juror Nibler on the ground of "conscientious scruples" against the death penalty. Juror Nibler was asked by the circuit judge if she could follow the testimony and instructions of the court although the "verdict could result in the death penalty"; juror Nibler said, "I couldn't."
>
> Upon this state of juror Nibler's voir dire examination, she was excused and the defendant urges reversible error under Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Having categorically stated that she couldn't follow the testimony and instructions of the court, we think that the juror was correctly excluded. The fact that upon questioning by defense counsel, Nibler stated she would try to be a "fair" juror did not qualify her in this case. Similar argument was made in Edwards v. State, supra, n. 1, but there the sentence was life imprisonment whereas here the sentence is death. Thus, the two cases are not precisely analogous. For an excellent explanation of the proper method of bringing the death penalty to the attention of the special venire in capital cases, see Armstrong v. State, 214 So.2d 589 (Miss. 1968). [413 So. 2d at 1009].

See also Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1969); Boulden v. Holman, 394 U.S. 478, 89 S.Ct. 1138, 22 L.Ed.2d 433 (1969); Maxwell v. Bishop, 398 U.S. 262, 90 S.Ct. 1578, 26 L.Ed.2d 221 (1970).

In Irving v. State, 361 So. 2d 1360 (Miss. 1978), we said:

> Following Witherspoon, this Court considered the procedure to be employed by trial judges in Myers v. State, 254 So.2d 891 (Miss.1971). That procedure follows:
>
> "'The proper method of bringing the death penalty to the attention of the special veniremen is for the trial judge to inform them that they have been summoned as veniremen in a capital case and that a verdict of guilty could result in the infliction of the death penalty. The judge should then ask them if any member of the panel has any conscientious scruples against the infliction of the death penalty, when the law authorizes it, in proper cases, and where the testimony warrants it. If there are those who say that they are opposed to the

> death penalty, the trial judge should then go further and ask those veniremen, who have answered in the affirmative, whether or not they could, nevertheless, follow the testimony and the instructions of the court and return a verdict of guilty although that verdict could result in the death penalty, if they, being the judges of the weight and worth of the evidence, were convinced of the guilt of the defendant and the circumstances warranted such a verdict. Those who say that they could follow the evidence and the instructions of the court should be retained, and those who cannot follow the instructions of the court should be released. The mere fact that a venireman is opposed to the death penalty does not disqualify him as a juryman, if he can do his duty as a citizen and juror and follow the instructions of the court, and where he is convinced of the defendant's guilt he can convict him although the verdict of the jury may result in the death penalty's being inflicted upon the defendant.' (Emphasis added). Armstrong v. State, Miss., 214 So.2d 589, at 593." 254 So.2d at 893-894. [361 So. 2d at 1360].

We are of the opinion that there is no merit in the first assignment.

II.

Did the lower court err in admitting evidence of appellant's non-violent criminal record as proof that the capital murder was "committed by a person under sentence of imprisonment," pursuant to Mississippi Code Annotated § 99-19-101(5)(a) (Supp. 1982)?

The appellant contends that when an accused receives a suspended sentence for a non-violent crime, such sentence may not be subsequently used in a capital murder trial to prove that, as an aggravating circumstance, the murder was "committed by one under sentence of imprisonment." He relies upon Peek v. State, 395 So. 2d 492 (Fla. 1980), wherein the Florida Supreme Court held that a defendant's probationary status was not a sentence of imprisonment, which would support Subsection (5)(a) of the statute. However, in Peek the death sentence was upheld on appeal in spite of the court's determination that a probated sentence had been erroneously included as an aggravating circumstance. The Florida Court said:

> Thus, we have two clearly valid aggravating circumstances, one contested but valid aggravating circumstance, and no mitigating circumstances. We find that the trial court's improper consideration of the two aggravating circumstances concerning pecuniary gain and commission of the offense while on probation does not render the sentence invalid. Hargrave v. State, 366 So.2d 1 (Fla. 1978); Elledge v. State, 346 So.2d 998 (Fla. 1977). [395 So. 2d at 499-500].

Subsequent to Peek v. State, the Florida Court said in Lewis v. State, 398 So. 2d 432 (Fla. 1981):

> The finding that appellant committed the capital felony while under a sentence of imprisonment was based on the fact that he was on parole from a prison sentence at the time of the murder. Based on evidence of this fact, we approve the court's finding of this aggravating circumstance. [398 So. 2d at 438].

In Dobbert v. State, 375 So. 2d 1069 (Fla. 1979), cert. den. 447 U.S. 912, reh. den. 448 U.S. 916, the Florida Court held, and the United States Supreme Court denied certiorari, that:

> Although two aggravating circumstances were improperly determined to exist, we conclude that the trial court properly found that the murder was committed to avoid lawful arrest and was especially heinous and cruel. . . .
>
> * * * *
>
> . . . The evidence is not such as would require the trial court to find any of the mitigating circumstances proposed by Dobbert as a matter of law. Since there are one or more validly found aggravating circumstances and no mitigating circumstances, a reversal of the death sentence is not necessarily required. Elledge v. State, 346 So.2d 998 (Fla.1977); Hargrave v. State, 366 So.2d 1 (Fla.1978). [375 So. 2d at 1070, 1071].

Jackson v. State, 381 So. 2d 1040 (Miss. 1980), involved an appeal from an enhanced sentence where it was contended that the statute required that a defendant actually serve the sentence through physical incarceration (Jackson's prior sentence had been suspended). We held the following:

> Jackson argues the conjunctive phrasing "and who shall have been sentenced . . ." evidences a legislative intent to include within the class of habitual offenders only those who have been twice convicted of distinct felonies for which penitentiary terms have not only been pronounced as punishment, but also served through actual incarceration. We reject this argument, because we think the statutory intention

is satisfied where, as here, the accused has been twice previously adjudged guilty of distinct felonies upon which sentences of one year or more have been pronounced, irrespective of subsequent probation or suspension of the sentences.

We are of the opinion the statute is intended to cure the evil of recidivism. Enhanced punishment relates to the conduct underlying the previous convictions. Adjudication of guilt and consequent pronouncements of sentences merely accord those convictions finality. Subsequent suspension of the sentences or probation is a matter of grace only, arising from the hope that the prospects of rehabilitation of the guilty warrant leniency. Clearly that hope is defeated when the beneficiary of the indulgence perpetuates further felonies. The statute is suited precisely to this problem. [381 So. 2d at 1042].

We are of the opinion that, under Mississippi statutes and decisions, when a person has been convicted and placed on probation, particularly here, where four (4) years of a five-year sentence were suspended, such sentence is a sentence under imprisonment. Even so, there were other aggravating circumstances in the present case, and, under the Florida decisions, they were sufficient to sustain the conviction.

III.

Did the trial court err in admitting into evidence at the sentencing phase of a death penalty case, proof of matters admitted by the defendant by his plea of guilty in open court, where such proof was not related to the aggravating circumstances set forth in Mississippi Code Annotated § 99-19-101 (1972)?

Appellant argues that certain evidence and exhibits introduced were erroneous and prejudicial since he pled guilty to the robbery-murder and that proof should have been limited to matters not admitted in his guilty plea. An orderly and coherent procedure in the sentencing phase requires proof of the manner in which the homicide was committed. Facts relevant to an aggravating circumstance are competent. The statute sets

forth eight (8) aggravating circumstances, any one, or more, of which may be proved. The State introduced nine (9) color photographs showing the body of the victim and the scene of the crime. Appellant contends that they were inflammatory and, since he had admitted the homicide, were not relevant in the sentencing phase.

Slides 1 and 2 show the cash register and the open cash drawer found by the police shortly after the robbery-murder. Slices 3 through 9 show the body of the victim and the surrounding store area. We think that the slides were competent and relevant on the issues of whether or not (1) the capital offense was committed while the appellant was engaged in the commission of robbery, and (2) the capital offense was committed for the purpose of avoiding or preventing lawful arrest, and (3) the capital offense was especially heinous, atrocious or cruel. In Coleman v. State, 378 So. 2d 640 (Miss. 1979), the Court had for consideration two (2) color photographs showing where shotgun pellets hit the victim on the right side of the head, lower arm and left side of his chest. The Court held that they were competent and had probative value on the aggravating circumstance of especially heinous, atrocious or cruel.

We have examined the opinions in Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L.Ed.2d 398 (1980) and Jordan v. Watkins, 681 F.2d 1067 (5th Cir. 1982),[1] which discussed the phrase in an aggravating circumstance "outrageous or wantonly vile, horrible or inhuman in that they involved . . . depravity of mind . . . ." (Georgia) and "was especially heinous, atrocius or cruel." (Mississippi). The decision of

---

[1]All trial judges should study the opinions in Godfrey and Jordan before submitting the aggravating circumstances in § 99-19-101(5)(h) to the jury.

the Georgia Supreme Court in Godfrey was reversed, the United States Supreme Court holding that the Georgia court did not apply a proper constitutional construction of the phrase. Jordan was reversed, following Godfrey, on the ground that in Jackson v. State, 337 So. 2d 1242, 1250 (Miss. 1976), the Mississippi Supreme Court gave no proper guidance to the jury for imposition of the death penalty on that aggravating circumstance.[2]

In the case sub judice, the victim was forced to kneel on the floor behind the counter with a .38-caliber revolver pointing at his head, he was made to stand up at gunpoint and open the cash register, and again was forced to kneel on the floor with the revolver still pointing at his head. He was physically assaulted by one of the robbers emptying his pockets, all occurring over a short period of time. From those facts, the jury could consider mental torture and aggravation which the victim probably underwent, and to determine whether or not the murder under all the facts and circumstances was especially heinous, atrocious or cruel. Even though it may be said that the facts of the homicide do not pass constitutional muster on the aggravating circumstance of being especially heinous, atrocious or cruel, three (3) other aggravating circumstances were proved by overwhelming evidence.

Dr. Baldev Pahwa, brother of the deceased, testified for the State and identified his deceased's brother from one of the photographs. The witness was emotional and sobbed on the witness stand.[3] The appellant argues that the testimony

---

[2] Decided before enactment of Mississippi Code Annotated § 99-19-101 (Supp. 1977).

[3] The appellant's mother testified in his behalf. While on the witness stand, she sobbed, cried and was as emotional, or more so, than Dr. Pahwa.

was calculated to inflame the jury more than the pictures introduced. We are unable to say that his testimony was not relevant and did not have probative value. It was for the purpose of identifying the victim and, as we have said in other cases, the appellant caused the situation and cannot complain, if the evidence has probative value.

Appellant next contends the court should have stricken from the appellant's confession (1) that part setting forth he and Artis planned to rob the food store and possibly slay the store clerk, (2) that he saw "Alfonso behind the counter pointing the gun at the man who was down on the floor on his knees," (3) that part relating to what appellant and Artis did following the murder, (4) that part stating it was his idea to rob R.J.'s Food Center, and (5) that part to the effect that he shot the man because "The man knew me and I did not want him to identify me."

We think that the entire confession was properly admitted in evidence. It was a part of the orderly presentation of the State's case and was relevant on the issues of aggravating circumstances submitted to the jury.

IV.

Did the lower court err in overruling the motion for mistrial when a witness testified that the victim's pregnant wife appeared at the scene of the crime shortly after it occurred?

Officer Willie Allen testified for the State, and during his testimony, the following question and answer was asked and given:

Q. And at the time you arrived there, other than the deceased, was there anyone else connected with R. J.'s Food Center there that you observed?

A. Okay. After getting the information from some of the witnesses that were working across the street, the family came, his wife and she was about seven or eight months pregnant and his mother and father--

The answer was not responsive to the question. Appellant's attorney objected on the ground that the wife's pregnancy unknown to the appellant prior to the homicide, had no relevancy to the aggravating circumstances and was prejudicial to the defendant. The trial judge sustained the objection in chambers, and asked appellant's attorney, if he desired him to instruct the jury to disregard the statement. The attorney argued for a mistrial, which was denied, and then told the trial judge he had no alternative except to request the jury be instructed to disregard the statement.

Each juror said that he (she) would disregard the statement. The jury is presumed to have followed the directions of the judge. There was no error under Hughes v. State, 376 So. 2d 1349 (Miss. 1979); Gray v. State, 375 So. 2d 994 (Miss. 1979); and Duke v. State, 340 So. 2d 727 (Miss. 1976).

Further, the court instructed the jury in Instruction No. 1 to "disregard all evidence which was excluded by the court from consideration during the course of the trial."

V.

Did the lower court err in permitting a witness to testify that the appellant said he killed the victim because he was "cold hearted?"

Alfonso Artis, the accomplice, testified that he asked appellant why he shot Mr. Pahua, and appellant replied, "I was cold hearted." Appellant testified on the trial that "I didn't mean to do it and I'm sorry." The statement he made to Artis

soon after the homicide was relevant on the issue of aggravating circumstances.

In Washington v. State, 361 So. 2d 61 (Miss. 1978), the facts were similar to those here. There, the defendant struck the victim over the head with a shotgun, had obtained the money and was backing out of the store when he shot the victim in the stomach with the shotgun. The testimony here shows that, as in Washington, he could have fled without cold-heartedly killing the proprietor of the store.

VI.

Did the lower court err in permitting the prosecution to cross-examine the defendant's mother about his prior juvenile record?

During the defense's direct questioning of appellant's mother, Mary Lewis, the following occurred:

> Q. Why did he not finish the tenth grade?
>
> A. Well, Connie, he stopped to look for work and he would get odd jobs, you know, in order to help me and he would cut yards or whatever he could find to do and he would bring me most of the money. Sometimes he would give it all to me. And he was real good about helping me. I never had no trouble out of him and when I had surgery, he stayed with me all the time. He cooked and waited on me and saw that I got my medicine. He was a good child and I don't know why he got into this. I reckon because he was with the wrong person, cause I never had no trouble out of him before. (Witness sobs). (Emphasis added).

The State cross-examined Mrs. Lewis on that response, and she reiterated the appellant had been into different little things a good while ago. The prosecuting attorney asked what little things she was talking about that he had been involved in, and she said he had gotten into something and he was released to his parents three or four times. She was interrogated in detail about those several times, but nothing was indicated as to what the matters involved or how they were disposed of

in the Youth Court. Appellant contends that the Youth Court Act prohibits use of an adjudication of the Youth Court for impeachment purposes in any court. The contention is correct, except that the right of a defendant or prosecutor in criminal proceedings is preserved to show bias or interest. Here, no reference was made to Youth Court proceedings or action, and no attempt was made to introduce any adjudication order. Also, the questions asked were proper to test the recollection of the witness and was in rebuttal. Allison v. State, 274 So. 2d 678 (Miss. 1973); Kearney v. State, 65 Miss. 233, 8 So. 292 (1890).

VII.

Did the lower court err in failing to rule on the admissibility of appellant's letter to Alfonso Artis in a proper and timely fashion?

While appellant and Artis were incarcerated before trial, appellant wrote Artis that, if he (Artis) continued to cooperate with the police, appellant would "do to you the same thing I did to that man in the store . . . ."

During cross-examination of appellant's mother, the State introduced the letter as a handwriting specimen. It was marked for identification but not admitted into evidence. After Mrs. Lewis completed her testimony, the appellant moved to suppress the letter, or, that the trial judge rule on its admissibility, if it were offered in evidence later during the trial. The judge declined to make an advance ruling. Appellant testified and, on cross-examination, the State confronted him with the letter and the trial court admitted it in evidence.

We do not think the judge was required to make an advance ruling and that such refusal was not error.

VIII.

Did the lower court err in refusing Jury Instructions D-3, D-4 and D-8?

Instruction D-3 follows:

> I have previously read to you the list of aggravating circumstances which the law permits you to consider if you find that any of them is established by the evidence. These are the only aggravating circumstances you may consider. You are not allowed to take account of any other facts or circumstances as the basis for deciding that the death penalty would be an appropriate punishment in this case.

Instruction 7 (S-1) granted by the court instructed the jury that it must find the existence of certain statutory aggravating circumstances beyond a reasonable doubt prior to any consideration of the death penalty. It further limited the statutory aggravating circumstances to those four (4) on which evidence had been adduced during the trial.

Instruction D-4:

> The Court instructs the Jury that the terms heinous, atrocious, and cruel are deemed to include those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies in that it involved the conscienceless or pitiless crime which is unnecessarily torturous to the victim. If you find from the evidence that the victim died a quick death without unnecessary pain and torture, then, though the crime is murder, it is not to be considered as especially heinous, atrocious or cruel.

In our opinion, under the facts of the case sub judice and under the Mississippi statute, Instruction D-4 was too restrictive and its refusal does not constitute reversible error notwithstanding Godfrey v. Georgia. Further, the discussion under Part III hereinabove applies on this question.

Instruction D-8:

> The Court instructs the Jury that even if you find that aggravating circumstances outweight the mitigating circumstances, you may still recommend mercy and sentence the Defendant to life imprisonment.

The sense of that instruction was submitted in Instructions D-1 and D-7.

Instruction D-1

* * * *

You are instructed that even if you find the existence of one, two, three or more aggravating circumstances, you still can conclude that the circumstances are insufficient to warrant death, and you may impose a sentence of life imprisonment.

Instruction D-7

The Court instructs the Jury that you are not required to find any mitigating circumstance in order to make a recommendation of mercy that is binding on the trial Court, but you must find a statutory aggravating circumstance before recommending a sentence of death.

IX.

Did the lower court correctly grant State's Instruction No. 7 (S-1)?

The mentioned instruction sets out the four statutory aggravating circumstances relied upon by the State. Appellant claims that the evidence did not show the homicide to be heinous, atrocious and cruel, nor did it properly establish that he was under sentence of imprisonment at the time the crime was committed.

These questions have been previously discussed hereinabove and lack merit.

X.

Did the lower court err in overruling objections to parts of the closing argument of the prosecution?

In the defense attorney's argument, Honorable James Bell made the following statement:

Keep in mind this. That there is a co-defendant here who received what amounts to a five-year sentence and ask yourself is it fair if the man wasn't holding the gun. He said that they talked about killing the man the day before. Ask yourself is it fair for him to get five years and Connie Ray Evans get death.

The district attorney, in answer, made the following statement: "You can sentence the defendant to life imprisonment but that's your sentence . .. that's just your sentence. . . . ."

The appellant argues that the statement by the district attorney was an insinuation that, if the jury fixed the sentence at life, appellant would not serve life in the penitentiary. In our opinion, the argument of the district attorney may be interpreted in whatever manner the hearer wishes to interpret same. It does not say what appellant's counsel interprets it to say. If the argument was improper, then it could be said that the appellant's attorney provoked the comment in response to his argument.

We are of the opinion that the district attorney's statement does not constitute prejudicial or reversible error.

APPELLATE REVIEW OF SENTENCE

In accordance with Section 99-19-105 (3)(a)(b)(c) . . . (5), and the decisions of this Court and the Federal courts on imposition of the death penalty, we have carefully reviewed the record in this case and have compared it and the death sentence imposed in the cases which have been decided by this Court since Jackson v. State, 337 So. 2d 1242 (Miss. 1976). Those cases consist of fourteen (14) decisions by this Court from Bell v. State, 360 So. 2d 1206 (Miss. 1978), to King v. State, No. 53,027, decided October 27, 1982 [not yet reported], in which the death penalty was upheld.[4] In Coleman v. State, 378 So. 2d 640 (Miss. 1979) the case was reversed as to punishment and remanded for resentencing to life imprisonment.

[4] A list of the cases is attached as Appendix A in King v. State.

In our opinion, after such review and comparison, the punishment of death is not too great when the aggravating and mitigating circumstances are weighed against each other and the death penalty will not be wantonly or freakishly imposed here.

We also find and conclude that the sentence of death was not imposed under the influence of passion, prejudice or any other arbitrary factor. The evidence in the case overwhelmingly supports the jury's finding of at least one statutory aggravating circumstance, viz: (1) the capital offense was committed by appellant while under sentence of imprisonment; (2) the capital offense was committed while the defendant was engaged in committing a robbery, (3) the capital offense was committed for the purpose of avoiding a lawful arrest, and (4) the capital offense was especially heinous, atrocious or cruel.

After comparison of the present case to those enumerated herein, we find that the sentence of death is not excessive or disproportionate to the penalty imposed in those cases, considering both the crime and the manner in which it was committed and the defendant. We also are of the opinion that the death penalty imposed on Evans is consistent and even-handed to like and similar cases and the sentencing phase followed in this trial provided a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not imposed.[5]

The judgment of the lower court is affirmed, and Wednesday, December 1, 1982, is set for the date of execution of the sentence and infliction of the death penalty in the manner provided by law.

AFFIRMED AND WEDNESDAY, DECEMBER 1, 1982, SET FOR EXECUTION OF THE DEATH PENALTY.

PATTERSON, C.J., BUGG, P.J., WALKER, P.J., BROOM, BOWLING, HAWKINS, DAN LEE and PRATHER, JJ., CONCUR.

---

[5] Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed.2d 346 (1972).